2008

Douglas Patrick Doyle v. Robin elaine Doyle : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

DOUGLAS PATRICK DOYLE, Petitioner/Appellant/Petitioner Below vs. ROBIN ELAINE DOYLE, Respondent/Appellee/Respondent Below	**BRIEF OF PETITIONER** Supreme Court Case No. 20090989-SC Appellate Case No. 20080618 District Court No. 034903528

An Appeal from the Ruling of the Utah Court of Appeals from the Judgment and Order of the Honorable Denise Lindberg, Third District Court, Salt Lake County, State of Utah

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STATEMENT OF JURISDICTION

Petitioner seeks review of an opinion of the Utah Court of Appeals filed by that court on October 29, 2009. This Court has jurisdiction to review judgments, orders, and decrees of the Court of Appeals through certiorari. UTAH CODE § 78A-3-102(3)(a); *see also* UTAH R. APP. P. 45-51. This Court granted certiorari on January 20, 2010. A true and accurate copy of this Court's Order granting certiorari is attached at "Appendix A."

STATEMENT OF THE ISSUES

Issue 1: Whether the Court of Appeals erred in affirming the District Court's refusal to formally bifurcate the reception of evidence at the custody hearing relating to a change in circumstances and best interest of the parties' child.

Standard of Review: It is a fundamental tenet of certiorari review that the Supreme Court reviews the decision of the Court of Appeals, not that of the trial court. *Reese v. Reese*, 1999 UT 75, ¶ 7, 984 P.2d 987. On certiorari review, the Supreme Court reviews the Court of Appeals' conclusions of law for correctness and grants them no deference. *Id.*, at ¶ 10.

Utah Code §30-3-10.4 states that a custody order should not be modified unless there has been a material and substantial change in circumstances. In an action to modify a custody order issued on the merits, a trial court is required to make a finding of materially changed circumstances before it can consider evidence as to the best interests of the child. *Hogge v. Hogge,* 649 P.2d 51, 54 (Utah, 1982). Failure to bifurcate the evidence of changed circumstances and best interest of the child is reversible error. *Fullmer v. Fullmer,* 761 P.2d 942, 946 (Utah App. 1988).

Preservation of the Issue: This issue was preserved for review by this Court when it was timely presented in the *Petition for Writ of Certiorari.* (On file with the Court and dated November 30, 2009). In addition, this Court granted certiorari to review this very issue in its January 20, 2010 Order. (*See* Appendix A, at ¶1).

Issue 2: Whether the Court of Appeals erred in affirming the District Court's determination that a substantial and material change in circumstances justified a modification of custody.

Standard of Review: As a general rule, the standard of review for a custody determination is abuse of discretion. *Wall v. Wall*, 700 P.2d 1124, 1125 n.1 (Utah 1985). A trial court has abused its discretion if there is no reasonable basis for the decision. *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). Reversal is appropriate when the decision is so unreasonable it is arbitrary and capricious. *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993). A finding of fact will be judged clearly erroneous if it is against the clear weight of evidence, or if the reviewing court is left with "a definite and firm conviction that a mistake had been made," although there is ample evidence to support the finding. *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Ct. App. 1991).

In the instant case, Petitioner does not contend that the findings of fact were insufficient in consideration of the evidence presented at trial.[1] Rather, Petitioner contends that the findings of fact are themselves insufficient as a matter of law to support

[1] Except as to the findings that Hyrum's performance had deteriorated and that Mr. Doyle had engaged in parental interference – for which issues there was no sufficient evidence.

the legal conclusion that there had been a material and substantial change of circumstances – and that the Court of Appeals erred in affirming the trial court's decision. Accordingly, Petitioner contends that the Court of Appeals should be reviewed for correctness. *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 14, 61 P.3d 1009 (holding that a successful challenge to a finding of fact requires a marshalling of the facts, whereas a successful challenge to a legal determination does not).

Preservation of the Issue: This issue was preserved for review by this Court when it was timely presented in the *Petition for Writ of Certiorari*. (On file with the Court and dated November 30, 2009). In addition, this Court granted certiorari to review this very issue in its January 20, 2010 Order. (*See* Appendix A, at ¶2).

Issue 3: Whether the Court of Appeals erred in affirming the District Court's modification of child support based on Rule 54(c) of the Utah Rules of Civil Procedure.

Standard of Review: The Supreme Court reviews the Court of Appeals' conclusions of law for correctness and grants them no deference. *Reese*, 1999 UT 75, ¶ 10. It is incorrect for a court to modify an existing child support order that has not been appealed, that has not been petitioned for according to a substantial change in circumstance, and that was not made in error. Furthermore, although Rule 54(c)(1) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried. *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733, 735 (Utah 1984).

Preservation of the Issue: This issue was preserved for review by this Court when it was timely presented in the *Petition for Writ of Certiorari*. (On file with the Court and

dated November 30, 2009). In addition, this Court granted certiorari to review this very issue in its January 20, 2010 Order. (*See* Appendix A, at ¶3).

STATUTES AND RULES OF CENTRAL IMPORTANCE

Utah Rule of Civil Procedure 54(c) provides, in relevant part:

> (1) Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party had not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

Utah Code § 30-3-5(1) provides, in relevant part:

> (1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties.

Utah Code § 30-3-10.4 provides, in relevant part:

> (1) On the motion of one or both of the parents, or the joint legal custodians if they are not the parents, the court may, after a hearing, modify an order that established custody if:
>
> > (a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified; and
> >
> > (b) a modification of the terms and conditions of the order would be an improvement for and in the best interest of the child.

Utah Code § 78B-12-210(3) provides:

> A written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case. If an order rebuts the presumption through findings, it is considered a deviated order.

STATEMENT OF THE CASE

This matter concerns the divorce of Douglas and Robin Doyle. A two-day bench trial was held in December 2004, before Judge Frank Noel of the Third District Court – in which the issue of custody of the parties minor son, Hyrum (then age 8), was fully litigated. (*See, e.g.*, Record, at 585-90). A Decree of Divorce was subsequently entered on February 28, 2005. (*Id.*, at 639-44). The decree awarded sole custody of Hyrum to Mr. Doyle. (*Id.*, at 639, ¶ 2). It further provided that "in the event that [Ms. Doyle] relocates to the Salt Lake Valley, the parties will have joint legal and physical custody and shall share time equally . . . ." (*Id.*).

Shortly after trial, Mr. Doyle filed a Rule 59 Motion for New Trial. (*Id.*, at 731-32). Ms. Doyle also filed a Rule 60 Motion for Relief from Judgment. (*Id.*, at 769-70). These motions were heard by Judge Himonas, who granted the former and denied the later. In short, Judge Himonas determined that the "automatic" change in custody provision in the divorce decree was not legally permissible – as a change of custody required notice and a hearing. (*Id.*, at 913-15, ¶ 3.b.). Notably, Ms. Doyle had moved from Denver to Salt Lake City in May 2005.

On October 11, 2005, Ms. Doyle filed a Verified Petition for Modification of the original Decree of Divorce. (*Id.*, at 865-69). Notably, the petition did not include a request for child support. (*See id.*).

On September 19, 2007, the trial court granted Mr. Doyle's Motion for Bifurcated Hearing. (*Id.*, at 1600). More specifically, the trial court stated that "judicial economy is best served by having the material change issue presented first, but the parties should be

prepared to immediately proceed to presentation of the substantive case if the Court determines the threshold issue has been satisfied." (*Id.*, at 1601).

The matter was tried before Judge Lindberg on October 2 & 3, 2007. At the beginning of trial, the court reversed its decision to bifurcate the trial—allowing Ms. Doyle to present her entire case at one time. The issues tried were limited to custodial modification. No evidence regarding child support was received. After trial, Judge Lindberg awarded sole legal custody to Ms. Doyle, and parent-time to Mr. Doyle. The trial court entered an Interim Order of Modification awarding the same on March 19, 2008. (*Id.*, at 1796-97).

In the meantime, between the end of trial and the entry of the interim order, counsel for Ms. Doyle submitted a proposed order – which also included a proposed order modifying child support. Petitioner objected to the same on January 9, 2008. (*Id.*, at 1650-54). The trial court subsequently scheduled a non-evidentiary hearing on the objection. The hearing was held on March 19, 2008. No testimony was given at this time. Rather, at the hearing, the trial court ordered the parties to submit briefing on the issue of whether child support modification was appropriate in this case. Petitioner submitted his brief on this issue on March 31, 2008. (*Id.*, at 1798-1810).

On May 7, 2008, the Court issued its Findings of Fact and Conclusion of Law. (Record, at 1937-57 – a true and accurate copy of which is attached and hereinafter referred to as "Appendix C"). Therein, the trial court found that a substantial and material change of circumstances had occurred since the entry of the divorce decree, and that a change in custody was in the best interest of the child. (*Id.*, at ¶¶ 17-25, 40-41).

On May 20, 2008, the Court issued its Memorandum Decision regarding child support – which order awarded the same to Ms. Doyle. (Record, at 1978-92).

The Court subsequently entered an Order of Modification on July 23, 2008. (Record, at 2013-27 – hereinafter referred to as "Appendix D"). Therein, Ms. Doyle was granted sole custody, care, and control of Hyrum, subject to reasonable parent time. (*Id.*, at ¶¶ 2-4). The Order of Modification also required that Mr. Doyle should pay child support. (*Id.*, at ¶¶ 7-12). Thereafter, Mr. Doyle timely filed his Notice of Appeal. (Record, at 1998, 2042).

The Court of Appeals issued its decision – via published opinion – on October 29, 2009. (*See* Appendix B). The Court of Appeals reversed, in part, and affirmed, in part. In sum, the Court of Appeals ruled that complete bifurcation of the custody modification was not required under *Hogge v. Hogge*. (*See id.*, at ¶¶ 11-14). Furthermore, the Court of Appeals ruled that there was substantial evidence to support the trial court's determination that a change in circumstances existed. (*See id.*, at ¶¶ 15-17). Finally, the Court of Appeals ruled modification of child support was legally appropriate – even though not requested in Ms. Doyle's petition – however, that the trial court had erred in determining the amount of the same. (*See id.*, at ¶¶ 19-26).

On November 30, 2009, Mr. Doyle timely filed his Petition for Writ of Certiorari. This Court granted the same on January 20, 2010. (*See* Appendix A).

STATEMENT OF THE FACTS

1. This action was instituted on June 9, 2003, when Mr. Doyle filed a Divorce Petition in the Third District Court. (Record, at 1-6).

2. The parties have one child together – namely, Hyrum Doyle (DOB 07/29/1996). Hyrum suffers from a degenerative neuromuscular disorder, which causes his muscles to weaken, so he wears leg braces. Hyrum also has communication and learning disorders, and has been in special education classes since age 4. (*See* Transcript I, at 36-37 – also marked as Record, 2044).

3. As mentioned above, a two-day bench trial was held in December 2004 – in which the issue of custody of the parties minor son was fully litigated. (*See*, *e.g.*, Record, at 585-90). A Decree of Divorce was subsequently entered on February 28, 2005. (*Id.*, at 639-44).

4. At the time of the divorce decree, Ms. Doyle lived in Colorado. (Transcript I, at 23).

5. On May 9, 2005, Ms. Doyle returned to the Salt Lake Valley. (*Id.*, at 25). It is undisputed that Ms. Doyle relocated in reliance upon the "automatic change" provision found in the divorce decree. (*Id.*, at 30).

6. As previously indicated, the "automatic change" provision was subsequently found to be null and void. Thus, Ms. Doyle was prompted to file her Verified Petition for Modification, on October 11, 2005.

7. A two-day bench trial subsequently commenced, as scheduled, on October 2 & 3, 2007. (*See* Record, at 1642-43, 1648-49).

8. At trial, the court allowed Ms. Doyle, over Mr. Doyle's objection, to present concurrent evidence on both the issue of whether a material and substantial change in circumstances had occurred *and* the issue of whether a change in custody was

in the best interests of the child. (*See* Transcript I, at 1-8; *see also* Appendix C, at ¶¶ 1-4.)

9. The trial court stated that the reason for allowing evidence touching upon changed circumstances and best interests at the same time was that it is "unreasonable to expect" certain witnesses "who [are] very busy . . . to come in and testify twice at different points in the proceedings . . . ." (*See*, Transcript I, at 8).

10. Judge Lindberg then stated: "You will have to trust me to consider those matters correctly . . . . But at this point I am going to receive the testimony." (*Id.*). Accordingly, the trial court heard evidence on whether a change in custody would be in the best interests of Hyrum before the Court ruled on whether there was, in fact, a change in circumstances underpinning the original divorce decree.

11. During trial, the court heard evidence from several witnesses on the issue of change in circumstances. For the purposes of this appeal, such evidence largely consisted of testimony regarding Hyrum's social and academic functioning – as well as testimony regarding Mr. Doyle's alleged marginalization of Ms. Doyle's relationship with her son.

12. Regarding the issues of social and academic functioning, testimony was received at trial:

a. From school personnel, that while Hyrum was behind in grade-level in science and language arts, that he was on track in respect to mathematics. (Transcript I, at 175-76). And, that while Hyrum was

still behind in some areas, he was making an improvement. (*Id.*, at 194).

b. That while Mr. Doyle decided to remove Hyrum from special education (*Id.*, at 48), Ms. Doyle was also present when that decision was made. (*Id.*, at 180, 205-06).

c. That Mr. Doyle decided to remove Hyrum from special education because he did not believe it was producing results, and only served to further alienate Hyrum from his peers. (Transcript II, at 334 – also marked as Record, 2045).

d. That Mr. Doyle removed Hyrum from special education in order to begin working with him at home. (*Id.*, at 395).

e. From Hyrum's then-current teacher, that she believed he was getting good at getting his work done (Transcript I, at 158), and that his math skills were also improving. (*Id.*, at 162).

f. That Dr. Kingston – Hyrum's therapist – also related that Hyrum was making progress academically because of changes in his home environment. (*Id.*, at 91-92).

g. That Dr. Hale – the court-appointed custody evaluator – did not believe Dr. Kingston had recommended that Hyrum continue in special education. (*Id.*, at 105-106).

h. That Mr. Doyle also removed Hyrum from special education because he wished to transfer Hyrum to a different school.

(Transcript II, at 353-55). And, that the principal of Hyrum's school did not oppose the transfer. (*Id.*, at 353).

i. That Mr. Doyle believed there was some evidence that Hyrum was suffering from bullying at school. (*Id.*, at 331). And, that Mr. Doyle believed Hyrum had no friends at school. (*Id.*, at 334).

j. That Hyrum's fourth grade teacher believed he was always a socially awkward kid. (Transcript I, at 180).

k. That Hyrum's fifth & sixth grade teacher also believed he had a hard time fitting in. (*Id.*, at 153).

l. That Dr. Hale believed Hyrum was socially and psychologically less sophisticated from the outset of her custody evaluation. (*Id.*, at 66).

m. And, that Hyrum had often excluded himself socially for many years – for example, that he had been spending recess walking around the school yard by himself since first grade. (Transcript II, at 337).

13. Regarding the parental alienation issue, testimony was received at trial:

a. From Dr. Hale, that Mr. Doyle had unplugged the telephone while Hyrum was talking to his mother. (Transcript I, at 93). However, Mr. Doyle clarified that he only prohibited Hyrum from calling his mother when it was for the third or fourth time in a given day. (Transcript II, at 331).

b. That Mr. Doyle had not allowed Ms. Doyle to attend Hyrum's IEP conference in March 2005. (Transcript I, at 31-32).

c. That Mr. Doyle had requested Ms. Doyle not be directly provided with copies of Hyrum's records from school. (Transcript II, at 358-59).

d. That Hyrum believed Mr. Doyle had not assisted him in purchasing gifts for his mother – even though Ms. Doyle had assisted him in purchasing gifts for his father. (Transcript I, at 71).

14. Nonetheless, the court also heard evidence on this same issue:

a. That Ms. Doyle had not been denied any parenting time since the custody order had been modified in November 2005. (*Id.*, at 30-31).

b. That Ms. Doyle freely admitted that it was Mr. Doyle's parental right to exclude her from the IEP conference. (*Id.*, at 31).

c. That Mr. Doyle was unaware that Ms. Doyle has intended upon coming to the IEP conference until he was informed by school personnel. (Transcript II, at 380).

d. That Mr. Doyle had invited Ms. Doyle to all future conferences. (*Id.*, at 384). And, that he did not object to Ms. Doyle being involved in Hyrum's school planning meetings. (*Id.*, at 403).

e. That Mr. Doyle had also provided copies of Hyrum's school records to Ms. Doyle voluntarily. (*Id.*, at 360).

f. That Ms. Doyle had not been excluded from other educational events or academic decisions – and, in fact, that she herself had often volunteered at Hyrum's school. (Transcript I, at 155).

g. That Dr. Hale did not believe that Hyrum was exhibiting any signs of a child suffering from parental alienation. (*Id.*, at 219).

15. On the first day of trial, Dr. Hale was permitted to testify not only to issues surrounding change in circumstance, but also to matters that clearly went to the issue of best interest. For example, Dr. Hale testified:

a. That Hyrum's preference was to be with his mother – as well as testifying to other Rule 4-903 considerations. (Transcript I, at 67, 218-21).

b. That she believed that Mr. Doyle was Obsessive-Compulsive, and that such a disorder would have an effect upon his parenting. (*Id.*, at 95-97).

c. That Ms. Doyle had historically exhibited symptoms of psychotic thinking (*id.*, at 121), but that she had no concerns about Ms. Doyle's present psychological well-being. (*Id.*, at 143).

d. That she also had no concerns about Ms. Doyle's ability to parent as a single mother, if she were given sole custody. (*Id.*, at 144, 211).

e. That Ms. Doyle's parenting style would be a good fit with Hyrum's needs were she granted sole custody. (*Id.*, at 214).

f. That she believed Ms. Doyle was more likely to co-parent with Mr. Doyle – than he with she – if she were granted sole custody. (*Id.*, at 218).

16. Ms. Doyle used the entire first day of trial, and much of the morning of the second day of trial presenting her case on all issues. Consequently, as the matter had been limited to a two-day trial, Mr. Doyle was unable to present any evidence until after the mid-morning break of the second day of trial. (*See* Transcript II, at 313).

17. However, before Mr. Doyle could put on any evidence, Judge Lindberg ruled from the bench that the Court had indeed found a material change of circumstances. (*See id.*, at 254-63).

18. Mr. Doyle objected to the Court's ruling from the bench, and orally moved for a mistrial because he had not been permitted to put on evidence of the lack of a change in circumstances. (*See id.*, at 260-61.)

19. The court responded that the parties may treat her determination as "preliminary," denied the motion for mistrial, and reopened evidence. (*Id.*).

20. Thereafter, the court continued to receive evidence on both elements of custody modification – change in circumstances and best interest.

21. During the course of the entire trial, the court did not receive any evidence regarding the modification of child support. (*Id.*, at 466).

22. On May 7, 2008, the Court entered its Findings of Fact and Conclusions of Law. (*See* Appendix C). The Court concluded that Ms. Doyle had proven, by a preponderance of the evidence, that a substantial and material change in circumstances had occurred – thus, justifying a modification of custody in the case. (*See id.*, at ¶ 40).

23. More specifically, the trial court found that each of the following constituted a change in circumstance:

a. That Ms. Doyle had moved back to Salt Lake City in reliance upon the "automatic change" in custody provision of the divorce decree. (*Id.*, at ¶ 18).

b. That the parties were faced with a new legal interpretation of the divorce decree upon the nullification of the "automatic change" provision by Judge Himonas. (*Id.*, at ¶ 19).

c. That while the divorce decree anticipated that Mr. Doyle's parenting skills would improve, Mr. Doyle continued to rely upon corporal punishment in disciplining Hyrum. (*Id.*, at ¶ 21).

d. That Hyrum's social, educational, and psychological functioning had deteriorated. (*Id.*, at ¶ 23).

e. And, that Mr. Doyle had attempted to marginalize Ms. Doyle's relationship with her son. (*Id.*, at ¶ 25).

24. The trial court also found that Hyrum's best interests were met by a change in custody. Accordingly, the trial court granted Ms. Doyle sole legal and physical custody, with liberal parent-time to Mr. Doyle. (*See id.*, at ¶ 41).

25. On July 23, 2008, the Court entered an Order of Modification – based upon the aforementioned findings and conclusions. (*See* Appendix D).

26. This appeal timely followed.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in affirming the trial court's refusal to formally bifurcate the child modification hearing. Admission of "best interest" evidence prior to a

finding that a substantial and material change in circumstances had occurred violates the rule established by this Court in *Hogge v. Hogge* and its progeny. This is especially true in cases where, like the instant case, the issue of child custody was fully litigated – as opposed to simply stipulated. The Court of Appeals failed to make this key distinction. As such, the Court of Appeal's decision offends the doctrine of *res judicata*. Likewise, Mr. Doyle was prejudiced by the failure to bifurcate because any subsequent finding of changed circumstance would have been tainted with "best interest" evidence.

The Court of Appeals also erred – as a matter of law – in affirming the trial court's finding of a change in circumstances. Under Utah law, a change in circumstances must be based upon a change in the custodial parent's ability or the functioning of the custodial relationship. In the instant case, the Court of Appeals affirmed the trial court's decision despite the fact that the findings did not meet this requirement. Rather, several of the findings focused on the change in Ms. Doyle's, the non-custodial parents, circumstances. This is impermissible. Likewise, one of the findings was based upon the fact that there was no change at all. This is illogical. The remaining findings were either not related to a change in the custodial relationship, offensive to sound judicial policy, or did not – as a matter of law – arise to level warranting a change of custody. Alternatively, at least two of the findings of fact were not supported by sufficient evidence.

The Court of Appeals further erred when it affirmed the trial court's modification of child support – although Ms. Doyle had requested no such change in her Petition to Modify. The Court of Appeals correctly noted that Utah Rule of Civil Procedure 54(c) allows the courts to grant relief even if the party had not requested it in its pleadings.

This rule, however, is not absolute. Rather, subsequent case law has restricted the courts from granting relief where the issue in question was neither raised nor tried. In the instant case, no evidence was received at trial regarding the modification of child support – and thus, Petitioner was denied a proper hearing on this issue.

ARGUMENT

I. The Court of Appeals erred in affirming the District Court's refusal to formally bifurcate the reception of evidence at the custody hearing relating to a change in circumstances and best interest of the parties' child.

Under Utah law, a trial court may, after a hearing, modify an order that established custody, if: (a) the circumstances of the child or the custodian(s) has materially and substantially changed since the entry of the order, and (b) the modification of the terms and conditions of the order would be an improvement and in the best interest of the child. UTAH CODE § 30-3-10.4(1) (2009); see also UTAH R. CIV. P. 106.

In *Hogge v. Hogge*, 649 P.2d 51 (1982), the Utah Supreme Court adopted a bifurcated procedure for determining issues of custody modification. Namely, a party seeking modification must demonstrate: (1) that since the time of the previous decree, there have been changes in the circumstances upon which the previous award was based, and (2) that those changes are sufficiently substantial and material to justify the reopening of the custody issue. *Hogge*, 649 P.2d at 54.

Furthermore, the *Hogge* court elaborated the mechanics by which the bifurcated procedure should take place. It explained that the trial court must first make a separate finding on issue of whether a petitioner has met the burden as to change in circumstances. *Id.* "If so, the court, *either as a continuation of the same hearing, or in a separate*

hearing, will proceed to the second step." *Id.* (emphasis added). Only then shall the court consider "evidence relevant to the welfare or best interest of the child." *Id.*[2]

The Utah Supreme Court affirmed and further clarified the bifurcation requirements in *Becker v. Becker*, 694 P.2d 608 (1984). There, the court stated that "[i]n the initial step, the [trial] court will receive *evidence only as to the nature and materiality of any changes in those circumstances* upon which the earlier award of custody was based." *Becker*, 694 P.2d at 610 (emphasis added). Moreover, the court added that: "[t]he required showing of materiality is to be distinguished from the evidence that is appropriately presented in the second phase of the proceeding . . . ." *Id.*

Thus, according to both *Hogge* and *Becker*, "best interest" evidence cannot and must not be received by the trial court before a material change in circumstance has been found. This requirement is clear and unambiguous. Furthermore, a failure to abide by this bifurcated process constitutes reversible error. *Fullmer*, 761 P.2d at 943, 946.

Nevertheless, in the instant case, the Court of Appeals affirmed District Court's decision not to completely bifurcate the modification hearing. (Appendix B, at ¶ 14). This constitutes reversible error by the Court of Appeals.

The facts below establish that prior to trial, Mr. Doyle filed an unopposed motion to bifurcate the hearing. The trial court granted that motion on September 19, 2007.

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[2] For example, the facts in *Hogge* illustrate that the district court had properly followed the bifurcated procedure in that case. At the hearing on the petition to modify, the respondent had produced ample evidence that she had overcome serious emotional problems. Based upon this evidence, the district court found a change in circumstance. Only then did the district court proceed to a *de novo* consideration of all evidence bearing upon the best interest of the children. *Hogge*, 649 P.2d at 54-55.

(Record, at 1600). Yet, at the October 2007 trial, and over the objection of Mr. Doyle, Judge Lindberg allowed Ms. Doyle to proceed by presenting concurrent evidence on both the issues of whether a material and substantial change in circumstances had occurred *and* whether a change in custody was in the best interest of the child. (*See* Transcript I, at 1-8; *see also* Appendix C, at ¶¶ 1-4).

On appeal, the Court of Appeals disagreed with the assertion that "change in circumstance" and "best interest" evidence must be presented separately. (Appendix B, at ¶ 12). On this point, it stated that: "[a]lthough the analytical framework requiring bifurcation of these determinations is clear, 'this framework says nothing . . . about how a trial court must receive evidence.'" (*Id.*, at ¶ 13). The Court of Appeals here relied upon *Huish v. Munro*, 2008 UT App 283, 191 P.3d 1242, in making this decision. This reliance, however, is misplaced in at least two respects.

First, the Utah Supreme Court has clearly defined the procedures by which the trial court must receive evidence in custody modifications. These procedures, which require a bifurcated process in cases which have previously been fully litigated, are set forth in *Hogge* and *Becker*, *supra*.

Second, *Huish* is not factually on point. *Huish* did not involve the modification of a *litigated* custody decree (as in the instant case), but rather the custody decree in *Huish* had been *stipulated* to by the parties. *See Huish*, 2008 UT App 283, ¶ 14, 191 P.3d at 1242. In contrast, the child custody order which was modified in the instant case was reached only after a two-day trial in December 2004. (*See* Record, at 585-90). This distinction is crucial. Moreover, this distinction appears to be the source of the Court of

Appeals' error in the present case. Taken in full, the quotation upon which the Court of Appeals has mistakenly relied, states:

> This framework says nothing, however, about how a trial court must receive evidence. Indeed, the Utah Supreme Court has said, since *Hogge*, that "*in change of custody cases involving a nonlitigated custody decree*, a trial court, in applying the change-circumstances test, should receive evidence on changed circumstances and that evidence may include evidence that pertains to the best interest of the child."

Id., at ¶ 17 (emphasis added). In short, *Huish* is inapplicable in the present case.[3] Moreover, it is the source of the Court of Appeal's principle error in this case.

Likewise, the Court of Appeals' reliance upon *Walton v. Walton*, 814 P.2d 619 (Utah Ct. App. 1991), is similarly misplaced. (*See* Appendix B, at ¶ 13). Once again, *Walton* involved the modification of a child custody decree based upon a *stipulation*. *Walton*, 814 P.2d at 620. Furthermore, the *Walton* court elaborated why this distinction was critical in the application of *Hogge*:

> This rule [established in *Hogge*] was later qualified in *Elmer* [*v. Elmer*, 776 P.2d 599 (Utah 1989)], which held that "in change of custody cases involving a *nonlitigated* custody decree, a trial court, in applying the changed circumstances test, should receive evidence on changed circumstances and that evidence may include evidence which pertains to the best interest of the child."

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[3] The Court of Appeals' reliance upon *Moody v. Moody*, 715 P.2d 507 (Utah 1985), is likewise misplaced. (*See* Appendix B, at ¶ 13). First, the Court of Appeals is relying upon language found in a concurring opinion. This is not binding authority, but mere *dicta*. Second, *Moody* is not factually on point. There, again, the parties entered into a joint custody decree via *stipulation*. *Id.*, at 507. Moreover, the pleadings and supporting affidavits (filed by both of the parties) admitted that "the constant changing of the children [had] resulted in a circumstance which [was] not in their best interest." *Id.*, at 509. Accordingly, *Moody* should be limited to it facts.

Id., at 621 (emphasis added). Furthermore, the *Walton* court continued:

> The reasoning behind tempering the *Hogge-Becker* rule in *nonlitigated* custody decrees is plain: "Too rigid an application of the rule . . . would lock a child into the custody of one parent or the other where there has been no determination on the merits of parenting ability of either parent . . . ."

Id. (emphasis added). As the issue of child custody was litigated in the present case, *Walton* and *Elmer* are simply not applicable; the Court of Appeals erred in following these cases.[4]

In a similar vein, the *Hogge* court explained that the need for a preliminary showing of substantial or material change in circumstances is necessary because "a custody decree is predicated on a particular set of facts." *Hogge*, 649 P.2d at 53. That is, because the custody decree is *res judicata*, it should not be modified unless changed circumstances are conclusively demonstrated. *Id. Res judicata*, thus, necessitates the bright-line division between "change in circumstance" and "best interest" evidence. Here, the Court of Appeals entirely ignored this distinction. Moreover, this necessity was simply not present in *Huish* – the primary case upon which the Court of Appeals now relies. *See Huish*, 2008 UT App 283, at ¶ 15 ("Thus, in situations like this one where custody is determined by stipulation, *res judicata* should be applied much less rigidly

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[4] This conclusion is supported by other panels of the Utah Court of Appeals. *See, e.g., Stevens v. Collard*, 837 P.2d 593 (Utah Ct. App. 1992) ("Specifically, while parties to previously litigated custody cases may not introduce evidence of a change's effect on a child's best interest in order to satisfy the threshold requirement of the *Hogge-Becker* test, those in previously non-litigated cases may offer such "best interest" evidence during both prongs of the *Hogge* analysis.").

because an unadjudicated custody decree is not based on an objective, impartial determination of the best interest of the child."). For this additional reason, *Huish*, *Walton*, *Elmer*, and the like are simply not on point. Therefore, they cannot serve as the basis for the Court of Appeals decision.

Finally, the Court of Appeals indicated that there was no showing that the trial court merged its analysis of changed circumstances and best interest issues. (Appendix B, at ¶ 14). This line of reasoning is erroneous on at least two levels. First, it entirely disregards the *Hogge-Becker* rule – as discussed above. Second, it disregards the natural and deleterious effects that the rule is designed to prevent.

On this latter point, the record indicates that upon the commencement of the second day of trial, Judge Lindberg entered a "preliminary" finding of changed circumstances before going on to consider the second day of testimony. (*See* Transcript II, at 260-61). Nevertheless, by the time the Judge Lindberg had made this "preliminary" ruling, the court had already heard from several witnesses regarding the best interests of the child – thus, tainting any finding of changed circumstances *ab initio*. For example, and as previously mentioned, Dr. Hale testified to issues of child preference, past parental conduct, present parental ability, likelihood of cooperating with a co-parent, and the like. Such evidence clearly goes to "best interest" under Utah law. *See* UTAH CODE 30-3-10 (a) & (d) (listing examples of "best interest" evidence). By receiving evidence regarding the best interests of the child before ever making a finding on the issue of whether a material and substantial change in circumstances had occurred, the trial court was prevented from objectively ruling on the material and substantial change issue. Any

finding of changed circumstances was irretrievably entangled with best interest evidence at this point.

Likewise, any "preliminary" finding was defective because Judge Lindberg reached the same before Mr. Doyle had an opportunity to present evidence. Additionally, the court cut-off Mr. Doyle and ended the trial before he had completed his presentation of evidence concerning the lack of changed circumstances. (*See* Transcript II, at 313). Thus, the trial court's failure to bifurcate these issues resulted in an irregularity in the proceedings that deprived Mr. Doyle of a fair trial. In short, by failing to completely bifurcate the trial, and by allowing Ms. Doyle to present all of her evidence on both the change in circumstance and best interest of the child factors, the trial court effectively allowed her an evidentiary advantage.

The Court of Appeals did not thoroughly address these latter arguments in its opinion – save that it seemed to uphold the trial court's actions in terms of duplicative evidence and judicial efficiency. (*See* Appendix B, at ¶ 14). This position, however, does not comport with Utah law. The schedules of the court, the parties, or the witnesses should not take precedent over the need for bifurcation. Indeed, in *Kramer v. Kramer*, 738 P.2d 624 (1987), the Utah Supreme Court held that "[m]any areas of the law involve bifurcated procedures at the trial level. We do not see why this one [i.e., child custody modification] is unduly burdensome . . . change of circumstances involves a very narrow spectrum of evidence. It should not be difficult for trial courts to keep the two separate." *Kramer*, 738 P.2d at n.1. Such reasoning is directly applicable to the instant case.

For each of these reasons, the Court of Appeals should be reversed. The District Court's Order of Modification should likewise be vacated.

II. The Court of Appeals erred in affirming the District Court's determination that a substantial and material change in circumstances justified a modification of custody.

The Court of Appeals erred in affirming the District Court's determination that substantial and material change justified a modification of custody. More specifically, the Court of Appeals erred when it stated that five findings of fact amounted to an implication "that the current custody arrangement had proven unworkable, and [that] this by itself is sufficient to meet the changed circumstances threshold." (*See* Appendix B, at ¶17). The Court of Appeals identified these findings as: (1) Ms. Doyle's relocation to Salt Lake City, (2) the striking of the automatic joint custody provision in the original decree, (3) a failure of improvement in Mr. Doyle's parenting skills, (4) Hyrum's deteriorating social and academic performance, and (5) Mr. Doyle's attempt to exclude Ms. Doyle from Hyrum's life. *Id.*

Yet, these five factors do not – as a matter of law – establish a change in circumstances because all of them focus on issues extraneous to the custodial relationship. Alternatively, the last two factors are not supported by sufficient evidence.

A. Judge Himonas' interpretation of the custody decree was not a change of circumstances

The Court of Appeals erred when it affirmed the trial court's determination that the striking of the automatic change of custody provision constituted a substantial and material change. (*See* Appendix B, at ¶ 16). Utah law provides that a petition to modify

custody will not be granted unless there was "a change in the circumstances upon which the original custody award was based *which substantially and materially affects the custodial parent's parenting ability or the functioning of the custodial relationship. . . .*" *Kramer*, 738 P.2d at 625 (emphasis added) (hereinafter referred to as "the 'substantial change in circumstances' test").

Judge Himonas' striking of the automatic change provision of the original divorce decree cannot constitute a substantial and material change in circumstances. A prior court's order cannot create a substantial and material change in circumstances because the court's actions are not the type of actions which affect the relationship between a custodial parent and child. Judge Himonas simply interpreted an order and ruled that the automatic change provision was an unlawful provision of the original divorce decree. His decision did not concern Mr. Doyle's relationship with his son. Rather, it simply affirmed that Utah law requires custody modification to proceed through a petition to modify. *See Hogge*, 649 P.2d at 53-54 (changes to the custodial relationship may only be made through a petition to modify).[5] Interestingly, neither party appealed this ruling.

Furthermore, Judge Noel's desire that the parents share custody if Ms. Doyle's relocated is also immaterial. There is simply no legal basis which meets the "substantial change in circumstances" test when such a desire fails to materialize. Rather, child

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[5] This procedure is necessary for several reasons. First, a previous child custody decree should be accorded deference through the doctrine of *res judicata*. *See Hogge*, 649 P.2d at 53-54. Second, altering child custody solely through modification proceedings, with their attendant high standards, protects the integrity of the custodial relationship from constant challenges and "ping-pong" scenarios. *Id.*

custody determinations must be based on presently existing facts. *See id.*, at 52. For this additional reason, the Court of Appeals was in error.

B. Ms. Doyle's relocation cannot constitute a change of circumstances

The Court of Appeals also erred when it determined that Ms. Doyle's relocation from Denver constituted a material change in circumstances. (*See* Appendix B, at ¶ 16). It is undisputed that Ms. Doyle specifically relied upon the terms of the original custody decree that provided for joint custody upon her relocation. (Transcript II, at 30).

Nevertheless, under Utah law, a parent seeking modification of a child custody order "must show that there has been a change in the circumstances upon which the original custody award was based which substantially and materially affects *the custodial parent's* parenting ability or the functioning of the custodial relationship. . . ." *Kramer*, 738 P.2d at 625 (emphasis added). Established precedent holds that inquiries as to whether a sufficient change in circumstances occurred focus on the custodial parent's situation and ability – not on changes in the non-custodial parent's situation. For example, a non-custodial parent's subsequent marriage, improved financial situation, or other improvements are not the types of changes that suffice to disturb the custodial relationship. *See Hogge*, 649 P.2d at 54.

The reason the change of circumstances test is focused on the custodial parent is because it is designed "to protect the custodial parent from harassment by repeated litigation and to protect the child from 'ping-pong' custody awards." *Kramer*, 738 P.2d at 626. In short, the change of circumstances inquiry focuses on the custodial parent to

avoid instability of parental relations. Notably, Ms. Doyle filed her Rule 60 Motion for Relief from Judgment less than three months after the Decree of Divorce had been entered. (Record, at 639-44, 769-770). Thus, the Court of Appeals erred when it held that a non-custodial parent's change of residence could support a modification of a litigated child custody decree.

Furthermore, the Court of Appeal's decision regarding relocation cannot be supported based upon the "unusual legal and factual changes in this case." (*See* Appendix B, at ¶17). Procedural irregularities and substantive errors in this case do not constitute a reason to depart from Utah law regarding change of circumstances. First, the claimed "unique procedural and substantive element" was here an unlawful provision. The automatic change provision was of no legal effect from its inception.

Likewise, Ms. Doyle's mistaken reliance on the same does not constitute a substantial change in circumstances. Once again, her reliance had no affect on the custodial relationship. Her intent in relocating is irrelevant in the modification proceedings because the fact of her relocation itself did not affect the custodial relationship. *See Kramer*, 738 P.2d at 625. In sum, it simply had no bearing upon whether the custodial relationship succeeds or fails. For this additional reason, the Court of Appeals should be reversed.

C. Mr. Doyle's alleged failure to make parental improvements does not constitute a change in circumstance

The Court of Appeals erred when it affirmed the trial court's finding that Mr. Doyle's failure to improve his parenting skills (as anticipated in the Decree of Divorce)

constituted a substantial change in circumstances. (*See* Appendix B, at ¶ 16). Such a finding is legally insufficient to constitute a change in circumstances, because, as a matter of law, it does not comprise a change from the original decree.

The Court of Appeals' ruling constitutes reversible error. Quite simply, modification of custody requires a *change* in the custodial relationship; absent a proven change in parental behavior, custody cannot be modified. *See Kramer*, 738 P.2d at 625. In the instant case, there was no concomitant finding that Mr. Doyle's parenting had diminished in any respect. Indeed, both courts specifically found that Mr. Doyle's behavior had *not changed*. (*See* Appendix B, at ¶ 17; Appendix C, at ¶ 21). Such a finding, by definition, precludes a change in circumstance. For this reason alone, the Court of Appeals should be reversed.

Furthermore, the fact that Judge Noel anticipated an allegedly unfulfilled parental improvement on Mr. Doyle's part does not support a ruling that a change in circumstances exists. As previously indicated, child custody determinations must be based on presently existing facts. *See Hogge*, 649 P.2d at 52. For this additional reason, the Court of Appeals should be reversed.

D. The Court of Appeals erred in affirming the trial court's finding that Hyrum's social and academic deterioration constituted a change in circumstances

The Court of Appeals also erred in affirming the trial court's finding that Hyrum's social and academic deterioration constituted a change in circumstances. In short, these findings were not correlated to a concomitant change in the custodial relationship – and thus, fail as a matter of law. Alternatively, the evidence presented at trial is insufficient

to support this finding. Finally, sound policy reasons urge against modifying custody based upon these considerations.

Under Utah law, a party seeking modification must show that there has been a change in circumstances which substantially and materially affects the custodial parent's parenting ability or the functioning of the custodial relationship. *Kramer*, 738 P.2d at 625. It is not enough for a party to show that a child has underperformed. Rather, the party seeking modification must prove, and the court must find, that the custodial parent's abilities or relationship have materially and substantially changed. *Id.* at 625.

In the instant case, there has been no finding that causally links an alleged decrease in Hyrum's performance to either a change in Mr. Doyle's parenting ability or to a change in the relationship between Mr. Doyle and Hyrum. Furthermore, there is no finding that establishes a baseline concerning Hyrum's abilities. In order to show a change, there has to be a baseline from which to measure. *See, e.g., Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989) ("The [trial court's factual] findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood."). It was undisputed at trial that Hyrum has special needs – both academically and physically. (Transcript I, at 36-37). In addition, Hyrum had shown special needs since he was a pre-schooler. (*Id.*). Accordingly, the need for a baseline finding is all the more critical in this case.

Furthermore, the evidence presented at trial was insufficient to support the finding that Hyrum was deteriorating both academically and socially. For instance, while the evidence did show that Hyrum was behind grade-level in science and language arts, it

also showed that he was making improvement in mathematics. (Transcript I, at 175-76). Dr. Kingston and others also related that Hyrum was making progress in these areas. (*Id.*, at 91-92, 158, 162, 194). Once more, while there was some evidence that Hyrum was suffering from bullying at school – which does not constitute evidence of change – there was no evidence that Hyrum ever had many friends. (Transcript I, at 153, 180; Transcript II, at 331, 334). To the contrary, the evidence showed that Hyrum had often excluded himself socially for many years. (Transcript II, at 337).

Finally, subjecting custody to a child's performance alone violates the sound judicial policy of protecting the integrity of custodial arrangements – so as to benefit the long-term welfare of the child. *See Hogge*, 649 P.2d at 54. This is especially important in cases involving children with learning or other neurological disabilities. In such a situation, difficulty in the child's academic and social performance may relate to a wide stratum of factors unrelated to the custodial relationship. Absent clear factual findings linking the diminished performance to parenting, special needs children run a greater risk of having custodial relationships disturbed. For this additional reason, the Court of Appeals should be reversed.

E. The Court of Appeals erred in affirming the trial court's finding that Mr. Doyle had attempted to marginalize Ms. Doyle's relationship with her son

Finally, the Court of Appeals erred in affirming the trial court's finding that Mr. Doyle had attempted to marginalize Ms. Doyle relationship with Hyrum. (*See* Appendix B, at ¶ 16). The trial court found that this attempt was manifest in actions such as unplugging the phone and restricting other contacts between Hyrum and his mother. (*See*

Appendix C, at ¶ 25). As fully set forth below, this finding cannot, as a matter of law, support a change in custody. Alternatively, the evidence presented at trial is insufficient to support this finding.

The testimony presented at trial demonstrated that Mr. Doyle unplugged the telephone while Hyrum was talking with his mother. (Transcript I, at 93). It also demonstrated that Mr. Doyle had not allowed Ms. Doyle to attend Hyrum's IEP conference in March 2005. (*Id.*, at 31-32). And that Mr. Doyle had requested the school not provide Ms. Doyle with direct access to Hyrum's school records. (Transcript II, at 358-59). Finally, it demonstrated that Mr. Doyle had not assisted Hyrum in purchasing a present for Ms. Doyle. (Transcript I, at 71). Even taking these allegations as true, they do not rise to a level warranting a change in circumstance finding.

Indeed, there was no finding that Mr. Doyle had ever denied Ms. Doyle visitation with Hyrum, or that he had ever failed to provide her with the right of first refusal regarding Hyrum's care. In fact, Ms. Doyle admitted that she had not been denied any such parenting time since the custody order was clarified in November 2005. (Transcript I, at 30-31). Likewise, Ms. Doyle admitted that it was Mr. Doyle's parental right to exclude her from the IEP conference. (*Id.*, at 31). On that same note, Mr. Doyle testified that he was not aware that Ms. Doyle was coming from Denver to attend the conference until that same day. (Transcript II, at 380). Likewise, he invited her to all future conferences (*id.*, at 384), and voluntarily provided her with all school records. (*Id.*, at 360). In addition, there was no evidence presented that Ms. Doyle had ever been excluded from any other educational events or academic decisions – and, in fact, she

herself testified that she often volunteered at Hyrum's school. (Transcript I, at 155). Moreover, Dr. Hale testified that Hyrum did not exhibit any signs of a child suffering from parental alienation. (*Id.*, at 219).

The case of *Sigg v. Sigg*, 905 P.2d 908 (Utah Ct. App. 1995), suggests that the facts in the instant case do not warrant a change of custody. In *Sigg*, the custodial parent left the country without informing the non-custodial parent, declined to provide the non-custodial parent with effective contact information for the children, unilaterally required supervised visitation, and arranged to have the non-custodial parent arrested on trumped-up harassment charges when the non-custodial parent was expecting to exercise visitation. *Id.*, at 910-11. Based upon these facts, the *Sigg* court ruled that acts of custodial interference could constitute a material change in circumstance. *Id.*, at 913. Notably, however, the court stated that such interference must arise to levels of "constant" and "egregious" denials of visitation before a change of custody should be ordered. *Id.*, at 915.

The *Sigg* court held that modification of custody based on custodial interference should only be permitted in extreme circumstances. *Id.* at 915. It also specifically cautioned that "changing the custodial parent is a serious step and can have far reaching implications for the children. Generally, it is in a child's best interest to have custody stabilized with one parent." *Id.* Modification based upon custodial interference, therefore, is only justifiable in extreme cases. *Id.* The instant case does not present an "extreme case." Isolated instances of disagreeable conduct cannot support a modification of custody because it is in a child's best interest to have custody stabilized with one

parent. Absent findings of extreme circumstances of custodial interference, it is error to modify child custody. Accordingly, the Court of Appeals should be reversed.

III. The Court of Appeals erred in affirming the District Court's modification of child support based on Rule 54(c) of the Utah Rules of Civil Procedure.

The Court of Appeals erred when it found that, pursuant to Rule 54(c)(1) of the Utah Rules of Civil Procedure, the trial court had the authority to modify its previous child support order without notice to the parties and an opportunity for Petitioner to be heard on that issue. (*See* Appendix B, at ¶¶ 20-23).[6] Respondent did not request that the trial court modify child support when she petitioned the court for a modification of custody. (*See* Record, at 865-69). It was not until after the evidentiary hearing was completed on the modification of custody that the trial court expressed its intent to modify child support as well.

The Court of Appeals correctly noted that Rule 54(c)(1) states, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in its pleadings." Utah R. Civ. P. 54(c)(1). However, in *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733 (Utah 1984), this Court made it clear that "[a]lthough Rule 54(c)(1) permits

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[6] The Court of Appeals also addressed the related issue of whether the District Court erred in determining the amount of child support under Utah Code § 78B-12-301. It determined that since the 2005 Divorce Decree clearly included a child support order that the amount of child support should be determined under the table contained in subsection (1) of the aforementioned provision. (*See* Appendix B, at ¶¶ 25-26). Accordingly, the Court of Appeals reversed and remanded for a determination of the amount Mr. Doyle must pay in accordance with the same. (*See* Appendix B, at ¶ 26). In so far as the modification of the child support order was legally appropriate (a point that Petitioner does not concede), Petitioner does not take issue with the determination of Court of Appeals concerning its amount.

relief on grounds not pleaded, *that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried.*" *Id.* at 735 (emphasis added).

In modifying and establishing a child support award, the trial court is required by statute to make a number of factual findings. *See, e.g.*, UTAH CODE §78B-12-210. Moreover, while the child support guidelines are to be applied as a rebuttable presumption, Petitioner is entitled to put on evidence to rebut that presumption by showing that "an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of the child in a particular case . . . ." UTAH CODE §78B-12-210(3). Petitioner was deprived of his opportunity to do so in this matter – no testimony was given on this issue during trial or at the March 19, 2008 hearing. (*See, e.g.*, Transcript II, at 466).

The Court of Appeals' decision that the trial court could modify child support without a hearing departs from the established precedent of this Court – as set forth in *Combe* – because it allows the trial court to grant relief on an issue that was neither raised nor tried. It, likewise, offends the doctrine of *res judicata*. *See Mascaro v. Davis*, 741 P.2d 938, 946 (Utah 1987) (one district court judge cannot overrule another district court judge of equal authority).

Therefore, the Court of Appeals should be reversed. The District Court's modification of child support should be reversed and the issue remanded for an evidentiary hearing.

CONCLUSION

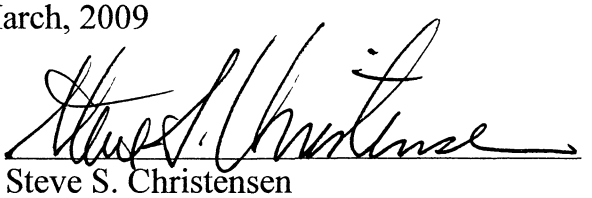
The Court of Appeals erred in affirming the trial court's decision not to completely bifurcate the custody modification hearing. Utah law requires that "change in circumstance" evidence be completely segregated from "best interest" evidence when the court is considering the modification of a child custody order that has been previously litigated – as opposed to one that had been reached via stipulation. The Court of Appeals failed to recognize this critical distinction.

The Court of Appeals also erred in affirming the trial court's decision that a change in circumstance had occurred since the entry of the divorce decree. On this point the Court of Appeals erred as a matter of law because a "change in circumstances" finding must focus on the custodial parent. Alternatively, the Court of Appeals affirmed several of the trial court's findings – despite the fact that they were not supported by substantial evidence.

The Court of Appeals further erred in affirming the trial court's decision to modify child support – especially when no such request was made in Ms. Doyle's Petition to Modify. Although the Utah Rules of Civil Procedure provide that a party may receive relief not requested in the pleadings, case law interpreting that provision does not allow that such relief may be granted when the issues were neither raised or tried.

For each of these reasons, Mr. Doyle respectfully requests that the Court of Appeals be reversed, that the District Court's Order of Modification be vacated, that the case be remanded, and for any other just and proper relief.

DATED this 11th day of March, 2009



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be sent to the following by United States Mail, first-class, postage prepaid, two (2) true, correct, and complete copies of the foregoing ***Brief of Petitioner*** on the 11th day of March, 2010:

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Kimberly Saling
An employee of Christensen Thornton

Appendix A

Order of the Utah Supreme Court Granting Certiorari
January 20, 2010

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Douglas Patrick Doyle,

Petitioner,

v. Case No. 20090989-SC

Robin Elaine Doyle,

Respondent.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on November 30, 2009.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues.

1. Whether the court of appeals erred in affirming the district court's refusal to formally bifurcate the reception of evidence at the custody hearing relating to a change in circumstances and best interests of the parties' child.

2. Whether the court of appeals erred in affirming the district court's determination that a substantial and material change in circumstances justified a modification of custody.

3. Whether the court of appeals erred in affirming the district court's modification of child support based on rule 54(c) of the Rules of Civil Procedure.

A briefing schedule will be established hereafter.

For The Court:

Dated 1-20-10

Matthew B. Durrant
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

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Dated this January 20, 2010.

By _____
Judicial Assistant

Utah Supreme Court Case No. 20090989
THIRD DISTRICT, SALT LAKE Case No. 034903528
Court of Appeals Case No. 20080618

Appendix B

Opinion of the Utah Court of Appeals
October 29, 2009

IN THE UTAH COURT OF APPEALS

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Douglas Patrick Doyle, Petitioner and Appellant, v. Robin Elaine Doyle, Respondent and Appellee.	OPINION (For Official Publication) Case No. 20080618-CA F I L E D (October 29, 2009) 2009 UT App 306

Third District, Salt Lake Department, 034903528
The Honorable Denise P. Lindberg

Attorneys: Steve S. Christensen, Matt Anderson, and Benjamin Lusty, Salt Lake City, for Appellant
Suzanne Marelius, Salt Lake City, for Appellee

Before Judges Greenwood, Thorne, and McHugh.

GREENWOOD, Presiding Judge:

¶1 Douglas Patrick Doyle (Father) appeals the trial court's order granting Robin Elaine Doyle's (Mother) motion to modify custody of their son (Son), arguing that the court made a fatal procedural error, incorrectly found a substantial and material change in circumstances had occurred, and erred in determining that Mother's custody of Son would be in Son's best interest. See Utah Code Ann. § 30-3-10.4 (2007). In addition, Father argues that even if the trial court correctly modified custody, it erred in modifying child support because Mother had neither requested nor was she entitled to such a modification. We affirm in part and reverse and remand in part for entry of a proper child support order.

BACKGROUND

¶2 Father and Mother were divorced by a decree entered in February 2005. Father, then residing in Salt Lake City, Utah,

was granted sole legal and physical custody of Son.[1] The decree also afforded Mother, then residing in Denver, Colorado, the following opportunity: "In the event [Mother] relocates to the Salt Lake Valley, the parties will have joint legal and physical custody and shall share time equally in alternating weeks and on holidays, as per standard schedule" (the joint custody provision). Less than three months later, in early May 2005, Mother moved back to the Salt Lake Valley in order to activate the automatic joint custody provision. Shortly thereafter, Father filed a Motion for Relief From Judgment pursuant to rule 60(b) of the Utah Rules of Civil Procedure, arguing that the joint custody provision impermissibly allowed custody to be prospectively changed based upon a future triggering event. See Utah R. Civ. P. 60(b)(6) (allowing courts to relieve parties from orders based on any reason justifying the requested relief, other than the reasons contained elsewhere in rule 60(b)). The trial court granted Father's motion, stating that the "change of custody requires notice and a hearing and cannot occur automatically upon a specified event." The trial court's order also maintained Father's custody of Son and amended the original Divorce Decree, Conclusions of Law[,] and Findings of Fact to reflect the order.[2] Mother did not appeal this order.

¶3 Mother then petitioned to modify the custody award, asserting that there had been a substantial and material change in circumstances because (1) she now resided in the Salt Lake Valley, in the same neighborhood as Father and Son; (2) she had relocated in reliance on the now-invalidated joint custody provision, the absence of which makes custody uncertain; and (3) Son's best interests require stability in his custodial arrangement, including a stable relationship with Mother. In response, Father filed a motion to bifurcate the custody modification hearing into two separate hearings: one to address whether a substantial and material change in circumstances had occurred and, if so, a second hearing to determine whether, based on the changed circumstances, custody modification was in Son's best interests. The trial court granted Father's unopposed motion to bifurcate "[t]o the extent that [Father]'s [motion] merely reaffirms the [statutory] requirement" that the court first determine whether there has been a substantial and material

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[1]Son requires special services due to physical and learning disabilities, some of which stem from a degenerative nerve disorder.

[2]Father's rule 60(b) motion was considered by a different judge than the judge who entered the divorce decree. A third judge, Judge Denise P. Lindberg, presided over Mother's petition to modify.

change in circumstances before reaching the best interests determination. The trial court further clarified that it did not agree with Father "if [his] intent is to have the Court hold separate trials on the bifurcated issues." The trial court accordingly informed the parties that "the material change issue [will be] presented first, but the parties should be prepared to immediately proceed to presentation of the substantive case if the court determines the threshold issue has been satisfied."

¶4 At trial on Mother's petition to modify custody, the court received testimony from several witnesses, including Dr. Valerie Hale--the court-appointed custody evaluator--and various officials from Son's school. At the beginning of the second trial day, the court made a "preliminary" finding that substantial and material changes had occurred since entry of the Divorce Decree but reserved making a final determination on the issue until the remainder of the evidence had been presented and Father had been afforded a full opportunity to rebut Mother's evidence. The trial court ultimately affirmed this preliminary finding, stating that the striking of the joint custody provision, among other factors, constituted a substantial and material change in circumstances not contemplated in the Divorce Decree. The trial court then made a best interests determination, concluding that, consistent with Dr. Hale's testimony and the recommendations of Dr. Hale and the Guardian Ad Litem (GAL), Mother's custody of Son was in Son's best interest. The trial court thus granted Mother's petition to modify custody and granted Mother sole legal and physical custody of Son.

¶5 The trial court also addressed the issue of child support after requesting and receiving supplemental briefing on that issue. According to the Divorce Decree, the social security disability benefits to which Son is entitled (the SSDI benefits) were credited against the child support obligations of both parents.[3] Otherwise, the Divorce Decree did not address child support. Mother argued that the original child support provision was not legally correct because the SSDI benefits should only have been credited toward her support obligation, not toward Father's, because they were based on her disability. In addition, Mother argued that child support modification was necessary due to the recent custody modification. Father, on the other hand, argued that crediting the SSDI benefits to both parents was not error because it was not specifically prohibited by either statutory or case law, and that Mother is not entitled to support modification because she failed to request it in her petition to modify. The trial court agreed with Mother,

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[3]The SSDI benefits to which Son is entitled stem entirely from Mother's disability.

determining that the original decree improperly credited the SSDI benefits against Father's support obligation, and that, although Mother did not explicitly request support modification in her petition, she was entitled to child support because it necessarily flowed from the custody modification. See id. R. 54(c)(1) (providing that, with exceptions not applicable to the present case, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings") Child support was modified according to calculations Mother submitted, based on the table contained in subsection (2) of Utah Code section 78B-12-301. See Utah Code Ann. § 78B-12-301(2) (2008). Father now appeals.

ISSUES AND STANDARDS OF REVIEW

¶6 Father first argues that the trial court's failure to "completely" bifurcate the change in circumstances issue from the best interests issue constitutes reversible error. Whether the trial court was required to hold separate hearings on these two issues involves the interpretation of Utah case law. "Pure questions of law . . . are reviewed for correctness." Huish v. Munro, 2008 UT App 283, ¶ 19, 191 P.3d 1242.

¶7 Father next argues that the trial court erred in determining that there had been a substantial and material change in circumstances sufficient to justify custody modification. "'The determination of the trial court that there [has or has not] been a substantial change of circumstances . . . is presumed valid, and we review the ruling under an abuse of discretion standard.'" Young v. Young, 2009 UT App 3, ¶ 4, 201 P.3d 301 (quoting Bolliger v. Bolliger, 2000 UT App 47, ¶ 10, 997 P.2d 903 (alterations in original)).

¶8 Father also argues that the trial court incorrectly concluded that Son's best interests would be served by modifying custody to grant Mother sole legal and physical custody, subject to Father's exercise of liberal parent time. "It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief." Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998).

¶9 Finally, Father argues that, in the event the trial court's custody modification is upheld, the trial court erred in modifying child support because Mother did not request, nor was she entitled to, such relief. We review the trial court's legal determinations regarding Mother's entitlement to child support modification for correctness. See Wall v. Wall, 2007 UT App 61, ¶ 7, 157 P.3d 341, cert. denied, 168 P.3d 819 (Utah 2007). As

for the amount of the modified child support, "[w]e will not upset the trial court's apportionment of financial responsibilities in the absence of manifest injustice or inequity that indicates a clear abuse of discretion." Maughan v. Maughan, 770 P.2d 156, 161 (Utah Ct. App. 1989).

ANALYSIS

I. Custody Modification

¶10 Father's appeal alleges various procedural and legal errors committed by the trial court during the custody modification proceedings. In particular, Father challenges the trial court's decision not to completely bifurcate hearings regarding the issues of changed circumstances and best interests, arguing that the trial court improperly allowed best interests evidence to be presented prior to a determination of changed circumstances. Father contends that he was prejudiced as a result of this procedural error. Relatedly, Father argues that the trial court erred in concluding that a substantial and material change in circumstances had indeed occurred. Finally, Father claims that the trial court erred in determining that Son's interests would best be served with Mother as his primary custodian. We address each of these issues separately below.

A. Complete Bifurcation

¶11 Father reiterates on appeal an argument he espoused before the trial court; namely, that Utah case law requires complete separation of the changed circumstances and best interests determinations, effectively preventing a party seeking custody modification from presenting any evidence relevant to best interests until it has been judicially determined that a legally sufficient change in circumstances has taken place. In other words, Father asks us to presume prejudice where the changed circumstances and best interests issues are not decided in completely separate hearings and evidence on both issues is not strictly segregated.

¶12 We agree with Father that Utah case law requires a determination that circumstances have materially and substantially changed before proceeding to a determination of which parenting arrangement is in the child's best interests. See Hogge v. Hogge, 649 P.2d 51, 53 (Utah 1982) (establishing two-prong analytical framework for custody modification); see also Becker v. Becker, 694 P.2d 608, 610 (Utah 1984) (applying Hogge and emphasizing that changes must be material, i.e., "the kind of circumstances on which an earlier custody decision was based"). However, we, like the trial court, disagree with Father

that evidence or testimony relevant to both a material change in circumstances and the child's best interests must somehow be presented separately.

¶13 Although the analytical framework requiring bifurcation of these determinations is clear, "[t]his framework says nothing . . . about how a trial court must receive evidence." Huish v. Munro, 2008 UT App 283, ¶ 17, 191 P.3d 1242. Cases decided subsequent to the establishment of this framework have recognized that trial courts have discretion to "deci[de] to merge the best interests of the child into the changed circumstances test . . .[,] particularly . . . when 'the initial custody award is premised on a temporary condition, a choice between marginal custody arrangements, . . . or similar exceptional criteria.'" Walton v. Walton, 814 P.2d 619, 621 (Utah Ct. App. 1991) (quoting Maughan, 770 P.2d at 160). Moreover, in the present case, as is quite frequently the situation, "the evidence supporting changed circumstances is . . . the same evidence that is used to establish the best interests of the child," Moody v. Moody, 715 P.2d 507, 511 (Utah 1985) (Daniels, Dist. J., concurring). And a trial court is granted "wide discretion in controlling the mode and order of the presentation of evidence," Huish, 2008 UT App 283, ¶ 18 (citing Utah R. Evid. 611(a) and Paulos v. Covenant Transp., Inc., 2004 UT App 35, ¶ 20, 86 P.3d 752), "provided it ke[eps] its analysis appropriately bifurcated," id. Stated more succinctly, "it is the bifurcation of the analysis--not the literal bifurcation of the proceedings--that matters." Id.

¶14 Much of the evidence presented at the modification proceeding addressed Mother's relocation to the Salt Lake Valley, Son's decreased sociability and his increasing behavioral and educational needs, Father's failure to make various parental adjustments contemplated in the Divorce Decree, and Father's inability and unwillingness to co-parent with Mother. We do not agree with Father that this evidence should have been presented in a separate hearing addressing sequentially the issues of change in circumstances and Son's best interests. In fact, the duplicative and overlapping nature of this evidence lends support to the trial court's decision to hear all the evidence together, so as to not waste resources of the court, the parties, or the witnesses. The trial court was also mindful of the unusual status of this case, resulting from the earlier striking of the joint custody provision after Mother's relocation in reliance thereon, Son's rapidly worsening disabilities, and the Divorce Decree's clear preference that Mother be a part of Son's life to the extent possible. Furthermore, Father has presented us with no evidence showing that the trial court conflated its analysis of the changed circumstances and best interests issues. Because the trial court bifurcated its analysis of these issues, and given the unusual circumstances of the case, the overlapping

nature of the evidence presented, and the trial court's inherent discretion to control the presentation of evidence, we see no error in the trial court's failure to completely bifurcate the hearings. See id. ¶ 19.

B. Substantial and Material Change in Circumstances

¶15 Father also argues that the trial court erred in determining that a substantial and material change in circumstances had occurred. Mother categorizes this determination as factual in nature and argues that Father has failed to marshal the evidence required to properly challenge this factual finding. Father responds, clarifying that his challenge is not directed toward the trial court's factual findings but instead is aimed at whether the trial court's "findings of fact themselves are insufficient as a matter of law to support the legal conclusion that there has been a material and substantial change of circumstances." Because Father characterizes this determination as a legal one, he urges us to apply a correctness standard of review. However, Utah law makes clear that a determination of whether substantial and material changes have occurred is a fact-intensive legal determination that is presumed valid and is reviewed for abuse of discretion. See Young v. Young, 2009 UT App 3, ¶ 4, 201 P.3d 301. Also, in making such a determination, trial courts must be mindful of two guiding principles: (1) the inquiry must "ordinarily . . . focus exclusively on the parenting ability of the custodial parent and the functioning of the established custodial relationship," Kramer v. Kramer, 738 P.2d 624, 626 (Utah 1987); and (2) the changed circumstances allegedly justifying the modification must be material, that is, they must "be the kind of circumstances on which [the] earlier custody decision was based," Becker, 694 P.2d at 610. Ultimately, the party seeking modification bears the burden of demonstrating a substantial change in circumstances. See Walton, 814 P.2d at 621.

¶16 In determining that a qualifying change in circumstances had occurred, the trial court made the following findings:

> [T]he [original custody] decision was based on the fact that, at the time, [Mother] was residing and working in Colorado and [Son] was doing well in a stable and supportive environment under [Father's] care.
>
> Relying on the [joint custody provision] of the Divorce Decree, . . . [Mother] informed her employer she would not be renewing her teaching contract, and completed her relocation to Salt Lake (and to [Son's]

neighborhood) within six to eight weeks following entry of the Decree.

The parties demonstrated their understanding of [the] Decree by the fact that they began implementing the [joint] custody provision[] of the Divorce Decree even as they sought to change it.

When [it was] determined that the automatic change [detailed in the joint] custody provision[] of the Divorce Decree violated Utah law, the parties were faced with a new legal interpretation of the Decree that neither side could have foreseen at the time it was entered.

Additionally, [the original judge] clearly anticipated that [Father]'s parenting skills would continue to develop, and that he would adopt less harsh discipline methods toward[] [Son]. In fact, however, [Father] has continued to rely excessively on corporal punishment . . . .

. . . .

At the time the Divorce Decree was entered, [the original judge] also expected that [Son] would continue to enjoy stability and success in [Father]'s care. Contrary to [the original judge]'s expectations, the evidence presented at trial leads the Court to find that [Son] has not been thriving in [Father]'s care. . . . [C]redible testimony from Dr. Valerie Hale, the Court-appointed evaluator, leads the Court to find that since [the original judge] entered his findings, [Son]'s level of social, educational, and psychological functioning has deteriorated. Indeed, at various times since the Decree [was] entered, [Son] has displayed increased anxiety levels and seriously dysfunctional ideation and behaviors.[]

[The original judge found] "that if either [Father] or [Mother] do not foster a loving relationship for [Son] by both parents for the benefit of [Son], by . . . limiting access to the child unreasonably . . . then . . . th[at] parent does not have the best interest of [Son] at heart and the Court would take that into account in the future,

> if any petition to modify the Decree of Divorce comes before the Court."
>
> Testimony from Dr. Valerie Hale . . . indicates that [Father] has attempted to marginalize [Mother]'s relationship with [Son] by taking actions such as unplugging the phone, . . . restricting other contacts between [Son] and [Mother] . . . [and] objecti[ng] to having [Mother] participate in [Son's mandatory special needs meetings at school].

The trial court also took note of the fact that the judge who entered the Divorce Decree took steps to ensure that both parents could be a part of Son's life to the fullest extent possible; most notable among these steps was the inclusion of the now-invalidated joint custody provision.

¶17 In sum, the trial court found that since entry of the Divorce Decree, Mother had relocated to Son's neighborhood, the joint custody provision had been invalidated, Father's parenting skills had not improved, Son's educational and social performance had deteriorated, and Father had actively attempted to exclude Mother from Son's life. Implicit in the trial court's findings is the fact that the current custody arrangement had proven unworkable, and this by itself is sufficient to meet the changed circumstances threshold. See Huish, 2008 UT App 283, ¶ 13. Moreover, none of these facts was anticipated in the Divorce Decree, they "focus [almost] exclusively on the parenting ability of the custodial parent and the functioning of the established custodial relationship," see Kramer, 738 P.2d at 626, and they address "the kind of circumstances on which [the] earlier custody decision was based," see Becker, 694 P.2d at 610. Thus, in light of the trial court's detailed factual findings and the unusual legal and factual changes in this case, we see no abuse of discretion in the trial court's determination that there had been a substantial and material change in circumstances since entry of the Divorce Decree.

C. Son's Best Interests

¶18 Father also cursorily argues that the trial court erred in determining that custody modification was in Son's best interests. However, "[i]t is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief." Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998). An argument is inadequately briefed if it "wholly lacks legal analysis and authority to support [it]." State v. Wareham, 772 P.2d 960, 966 (Utah 1989). The entirety of Father's argument regarding Son's best interests is one paragraph

long, provides no citation to legal authority or the record, and contains only conclusory statements such as "[Father] cared for [Son] with utmost care." Because Father's best interests argument is inadequately briefed, we decline to address it further.[4]

II. Child Support Modification

¶19 Father contends that the trial court's modification of child support following the order of custody modification was legally inappropriate because Mother neither asked for, nor was she entitled to, such relief. Father further alleges that the trial court applied the wrong child support guidelines in determining the amount of child support. We address each of these arguments in turn.

A. Modification of Child Support Is Legally Appropriate

¶20 Father argues first that Mother's failure to request support modification in her petition to modify custody is fatal to the trial court's award. The trial court recognized Mother's failure to request support modification in her petition but nevertheless determined that rule 54(c)(1) of the Utah Rules of Civil Procedure, combined with a trial court's inherent discretion in domestic cases, allows the modification in this case. We agree.

¶21 Rule 54(c)(1) states, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Utah R. Civ. P. 54(c)(1). This rule also allows trial courts discretion, in the interest of justice, to "determine the ultimate rights of the parties . . . as between . . . themselves." Id. The Utah Code further buttresses the trial court's child support decision, stating that "[o]bligations ordered for child support . . . are for the use and benefit of the child and shall follow the child." Utah Code Ann. § 78B-12-108(1) (2008) (emphasis added). Rule 54(c)(1) and the Utah Code, when considered together, allow the trial court discretion to modify the parties' child support obligations despite Mother's failure to request such relief in her petition.

¶22 Father also contends that even if the trial court had the discretion to modify child support, it was not appropriate because the original order in the Divorce Decree was adequate. We disagree. Utah Code section 78B-12-203(8)(b) provides that

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[4]We nevertheless observe that there was sufficient evidence that Son's best interests would be served by the custody modification.

"Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent." Id. § 78B-12-203(8)(b) (emphasis added). When entering the Divorce Decree, the trial court credited the SSDI benefits against both parents' support obligations, despite the fact that the benefits stem entirely from Mother's disability.

¶23 Although Father acknowledges that the SSDI benefits should be credited toward Mother's support obligation, he argues that nothing in the language of section 78B-12-203(8) precludes the trial court from crediting the SSDI benefits toward his support obligation as well. Again, we disagree. The plain language of section 78B-12-203(8) clearly states that such benefits are to be credited against the support obligation of "the parent upon whose earning record it is based." Id. This language does not give trial courts discretion to alter this credit. See id.; cf. Meenderink v. Meenderink, 2006 UT App 348, ¶ 8, 144 P.3d 219 (determining that the trial court had no discretion to decide whether or how to apply the credit for social security disability benefits, stating simply that the predecessor to section 78B-12-203(8) "mandates full crediting of the SSDI payments toward [the earning parent's] child support obligation"). Accordingly, we conclude that the trial court did not err in modifying child support to provide Mother and Son the relief to which they are entitled and to correct the error in the original child support award.[5]

B. The Amount of Modified Child Support is Incorrect

¶24 Father asserts that even if support modification is appropriate, the amount of the support awarded is incorrect because the trial court applied the wrong statutory child support guidelines. Section 78B-12-301 of the Utah Code contains two tables to be used for establishing or modifying child support orders. See Utah Code Ann. § 78B-12-301. Which table to be used is determined by the date of the establishment or modification of the support order. The table contained in subsection (1) applies to any "child support order . . . established or modified on or before December 31, 2007," while the table in subsection (2) is

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[5]Relatedly, Father briefly argues that the law of the case doctrine prevents the trial court from modifying the original support order even if it was entered in error. We disagree, because the law of the case doctrine does not go so far as to "prohibit a judge from catching a mistake and fixing it." Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah Ct. App. 1994) (internal quotation marks omitted).

to be used--with several exceptions not relevant to our analysis--to modify all "support order[s] entered for the first time on or after January 1, 2008." Id. § 78B-12-301(1)-(2).

¶25 Although Father contends that the Divorce Decree contained an order relating to child support, Mother argues that the decree "did not include a child support order, as contemplated by the [Utah Code.]" Mother further asserts that the Divorce Decree failed to include required findings for a child support order and determined that the SSDI benefits were awarded in lieu of a child support order. Mother therefore urged the trial court to modify support based upon the table in subsection (2). The trial court agreed with Mother and applied the table in subsection (2) because it concluded that the Divorce Decree did not contain a child support order. To determine the correctness of this conclusion, we must decide whether the 2005 Divorce Decree includes a child support order: If it does, then the table in subsection (1) should have been applied; if it does not, then the trial court correctly applied the table in subsection (2). See id.

¶26 In connection with granting custody of Son to Father, the Divorce Decree stated that "it is reasonable to allow [the SSDI] benefits to serve as child support and it is reasonable to not require child support to be paid by [Mother]." The Divorce Decree thus concluded that the SSDI benefits "should be used to satisfy both parties' child support obligations, with the parties having no further child support claim against or obligation to each other." Despite Mother's arguments to the contrary, this order clearly addressed child support and is therefore properly considered a child support order. Because the Divorce Decree contained a child support order and was entered "before December 31, 2007," the trial court erred in applying the table in subsection (2) to determine the modified child support amount. See id. Accordingly, we reverse and remand for a determination of the amount Father must pay under the table contained in subsection (1).

CONCLUSION

¶27 We conclude that the trial court did not err in failing to hold separate hearings on the issues of changed circumstances and best interests. We also see no abuse of discretion in the trial court's determination that substantial and material changes had occurred since entry of the Divorce Decree. And because Father has inadequately briefed his challenge to the trial court's best interests determination, we affirm that determination as well. Thus, there was no error in the trial court's decision to modify custody. Finally, we conclude that although it was proper for

the trial court to modify child support, the trial court applied the wrong guidelines in determining the amount thereof. We therefore affirm the trial court's decision in all respects except for its determination of the amount of modified child support, which determination we reverse and remand so that the court may recalculate child support according to the correct child support guidelines.

Pamela T. Greenwood,
Presiding Judge

¶28 WE CONCUR:

William A. Thorne Jr., Judge

Carolyn B. McHugh, Judge

Appendix C

Findings of Fact and Conclusions of Law
May 7, 2008

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS PATRICK DOYLE, Petitioner, -vs- **ROBIN ELAINE DOYLE,** Respondent.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 034903528 Judge Denise P. Lindberg Commissioner T. Patrick Casey

¶1 On October 2 and 3, 2007, the Court held a bench trial on Respondent's Petition to Modify the Divorce Decree entered by the Court on February 28, 2005. Petitioner Douglas Doyle (Doug) was present and represented by counsel Steven Christensen and Brennan Moss. Respondent Robin Doyle (Robin) was present and represented by counsel Suzanne Marelius. The parties' minor child, Hyrum Doyle (Hyrum) did not participate in the trial, but was represented by private Guardian *ad Litem* (GAL) Kim Luhn. In advance of trial Petitioner moved the Court to bifurcate the trial into separate hearings–the first one to address whether the Petition to Modify met the standard of a substantial and material change in circumstances, and the second one to consider Hyrum's best interests.

¶2 The Court granted Petitioner's motion in part and denied it in part. The Court agreed with Petitioner that it was required by law to address first whether the threshold standard for granting a modification had been met, and only if that threshold standard was satisfied would the Court proceed to determine whether the requested custody modification was in Hyrum's best interests.

However, the Court disagreed with Petitioner on the need for separate hearings. The Court concluded that judicial economy was best served by having all the evidence presented during the two (sequential) days set aside for trial,[1] although the two issues would be considered separately and in the order dictated by law.[2] Additionally, at the final pretrial conference, and again at the beginning of trial, the Court discussed with the parties the amount of time that would be available to each side to present its case.[3] Neither side lodged timely objections to the trial time allocation.

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[1]By consolidating trial time witnesses only have to be called once to appear and testify, sparing them the possibility of having their regular schedules twice disrupted and saving the parties additional witness fees. *See, e.g*, *Moody v. Moody*, 715 P.2d 507, 511 (Utah 1985)(Daniels, District Judge (concurring). By consolidating the presentation of the evidence the Court is also better able to remember all the relevant testimony without having to spend additional preparation time between separate hearings to review notes and refresh its recollection of the facts.

[2]At a pretrial hearing the Court had addressed various motions *in Limine* brought by Petitioner. One of the motions sought to exclude Dr. Hale's custody evaluation report on the basis that the information in the report went to the issue of "best interests" and should not be considered at the initial phase of the custody modification trial. The Court denied the motion based on its prior ruling on the bifurcation issue. Petitioner then moved to continue the trial, which motion the Court also denied. The Court indicated it would address specific objections to the evidence as they arose.

[3]The Court informed counsel that trial would begin at 9:00 a.m. each day, there would be a mid-morning and mid-afternoon break (each of which would be approximately 15 minutes in duration), a lunch break of approximately one hour, and the Court would recess each day between 4 and 4:30 p.m. in order to handle other matters. Based on those break and recess periods, each side would have approximately five (5) hours of time to present their case. The GAL was allocated one (1) hour of trial time). Throughout the trial the Court kept the parties informed as to the amount of time remaining to them. Although the Court extended the time allotted to counsel by shortening or eliminating the normal mid-morning and mid-afternoon breaks and by limiting the lunch periods significantly, Petitioner's counsel objected that they had been denied the opportunity to present all the evidence they desired. The Court rejects counsels' claim. Having been given fair warning of the time limitations, Petitioner' counsel made tactical decisions about how they wished to present their case and where they would spend their time. Moreover, by announcing its determination on the threshold issue at the beginning of the second

¶3 After considering the evidence adduced during the first day, the Court opened the second day of trial by stating the reasons why it was satisfied that the threshold showing of a substantial and material change in circumstances had been met. Petitioner noted his objection on the grounds that he had not had adequate opportunity to challenge Respondent's case. In response the Court stated it would treat its judgment on this issue as "preliminary," and Petitioner was free to present whatever other evidence he wished the Court to consider.[4]

¶4 At the conclusion of the second day of trial the Court reaffirmed its previously announced determination that a substantial and material change of circumstances had indeed occurred which was not anticipated at the time the Decree was entered. The Court also announced its findings and judgment on the issue of what custodial arrangement would best serve Hyrum's interests. At the Court's request Respondent's counsel prepared proposed Findings of Fact, Conclusions of Law and Decree of Modification, and forwarded the same to opposing counsel. Petitioner lodged numerous objections which the Court has considered. After reviewing the trial record, the exhibits and testimony adduced at trial, and the arguments and objections of counsel, the Court is fully advised. As more fully set forth below, the Court enters its Findings of Fact, Conclusions of Law,

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day, the Court hoped to expedite matters and to free counsel to focus on the more critical issue of the child's best interest. To the extent that counsel failed to heed the Court's warnings, misallocated time and, as a result, did not cover all the issues they intended to cover, responsibility for those choices lies with them rather than with the Court.

[4]After ruling on the existence of substantial, material change of circumstances, Petitioner's counsel made an oral motion for mistrial. The Court denied the motion. Counsel for Petitioner then made an oral motion to stay the ruling of the Court; that motion was also denied. The Court directed the parties to continue their evidentiary presentation to prove the elements required for the custody modification and defense. The trial continued thereafter on the issue of best interests and Petitioner's defense to the Petition.

and Decree. Before doing so, however, the Court digresses briefly to explain the background and unusual posture of this case

BACKGROUND

¶5 These parties were married in September 1995. They separated in June 2003. Following a divorce trial held December 13 and 14, 2004, Judge Frank Noel entered Findings of Fact, Conclusions of Law and a Decree of Divorce on February 28, 2005.

¶6 The parties' son, Hyrum, was born July 29, 1996. He suffers from a peripheral nerve disorder known as "Charcot Marie Tooth Syndrome," which cause patients slowly to lose normal use of their extremities due to muscle and nerve degeneration. Hyrum has also exhibited other learning and speech delays, and began receiving special education services through the Salt Lake School District in preschool, at age 3.

¶7 At the time the Divorce Decree was entered Robin was living in Colorado; Hyrum was in Salt Lake in the custody of his father. In his Findings of Fact accompanying the Divorce Decree Judge Noel noted that Doug's rigid and harsh methods with respect to both Robin and Hyrum had resulted in "some abuse" to both With respect to Robin, Judge Noel noted Doug had sought to exercise control over Robin, her activities and relationships. With respect to Hyrum, Judge Noel expressly referenced one incident prior to May 2003 "in which Doug slapped Hyrum and in which Doug verbally abused Hyrum." Findings of Fact, ¶7. Nevertheless, Judge Noel concluded that since the time of that incident Doug had "grown" and had shown a "sincere desire to improve and be a good father." *Id.* at ¶8. Judge Noel further found that Doug and Hyrum shared a loving relationship, that Hyrum had "thrived" in his father's care, and was "happy and contented in Doug's custody." *Id* at ¶11. Judge Noel stated

"The evidence further suggests that [Hyrum] has established a network of friends and relationships in which he is happy, and that he is actively involved in scouting and church activities." Based on these findings Judge Noel determined that Doug should be awarded sole legal and physical custody of Hyrum. But, Judge Noel's Decree also provided that "[i]n the event [Robin] relocates to the Salt Lake Valley, the parties will have joint legal and physical custody and shall share time equally on alternating weeks and on holidays as per standard schedule." Decree, at ¶2.

¶8 It is evident from Judge Noel's findings of fact that his principal reason for awarding custody as he did was so as not to disrupt an environment in which Hyrum was happy and thriving. It is also apparent that Judge Noel believed Robin and Doug were equally capable of meeting Hyrum's needs, as evidenced by the fact that the Decree anticipated the two would share joint legal and physical custody of Hyrum if Robin returned to Salt Lake County.

¶9 Given the rationale adopted by Judge Noel in his Findings of Fact and Conclusions of Law in support of the Divorce Decree, and the anticipated opportunity to share custody of Hyrum if she returned to Utah, Robin gave up her job in Denver, where she was teaching science as an adjunct faculty member at Front Range Community College. Robin relocated to Salt Lake City on May 9, 2005, moving to an apartment across the street from Hyrum's elementary school (Woodrow Wilson Elementary) where he was attending the 4th grade.

¶10 Shortly thereafter, on May 27, 2005, Robin filed a Motion for a New Trial. Doug had earlier filed a Motion for Relief from Judgment. In the interim, Judge Noel had retired from the Court and his caseload had been assigned to Judge Deno Himonas. On August 12, 2005, Judge Himonas held a hearing on the parties' respective motions. At the conclusion of the

hearing Judge Himonas denied Robin's motion and granted Doug's motion. An Order reflecting the Court's ruling was entered January 11, 2006.

¶11 Judge Himonas' ruling was based on his finding that the provisions in the Divorce Decree for change of custody "require[d] notice and a hearing and "[could not] occur automatically upon a specified event." Judge Himonas' Order explained that the effect of the ruling meant that Doug would retain sole legal and physical custody of Hyrum, and that "any request to modify the custody award [would have to be] made by Petition to Modify the Divorce Decree." Based on the Court's ruling and Order, Robin filed a Verified Petition for Modification on October 11, 2005.

¶12 Upon Robin's return to Salt Lake the parties began sharing equal parent time; Robin later filed a Motion for Temporary Orders to clarify the parent time and custody status. That Motion was heard by the Commissioner on November 16, 2005. An Order reflecting the recommendations of the Commissioner was signed by the Court on January 23, 2006. Pursuant to the Commissioner's recommendation the Court denied the request to change custody, but ordered that the parties continue implementing the shared parenting arrangement without labeling it joint custody. Specifically, the Court ordered that the parties "share equal time with the minor child on a seven day rotating basis." The Commissioner determined that the parent time award in the Divorce Decree was stated separately from the custody terms that Judge Himonas' Order had invalidated. Therefore, the Commissioner recommended that the time sharing provisions be enforced, as consistent with Judge Noel's Decree.

¶13 The Court's Order of January 23, 2006 also provided that there should be no change to Hyrum's school enrollment unless the parties mutually agreed to the change.

¶14 On or about March 2006, Robin requested that the Court order a custody evaluation, and proposed to the Court the names of two possible evaluators. The Court agreed that a custody evaluation was indicated and appointed Valerie Hale, Ph.D. to perform it. The Court ordered that the parties jointly share the expense of the evaluation. In order to have the evaluation commence as quickly as possible, the Court's order provided that Robin could pay Dr. Hale's entire initial retainer, and that Doug would reimburse Robin for his obligation of one half of the retainer; Doug was ordered to reimburse Robin at the rate of $100.00 per month.

¶15 Robin receives disability payments based on her total blindness. As a result of Robin's disability, the Social Security Administration also pays a dependent payment in the amount of $614 per month. Paragraph 6 of the Divorce Decree provided that the benefit received on Hyrum's behalf would be allocated in lieu of other child support. At Paragraph 7 of the Decree, the Court awarded Hyrum's entire dependent payment to Doug as long as he had sole custody. In the event that Robin relocated to Salt Lake County, the Decree further ordered that Robin would become the payee on the dependent payment, and that the amounts received be equally divided between Doug and Robin.

¶16 The unusual procedural posture of this case, involving, as it does, changed factual circumstances as well as a changed legal interpretation of how regarding certain provisions of the Divorce Decree can be effectuated, creates the context in which the Court makes its:

FINDINGS OF FACT

Findings Regarding Substantial and Material Changes in Circumstances Not Anticipated at Time Decree Entered.

¶17 During the divorce trial before Judge Noel, Doug had challenged Robin's fitness to care for Hyrum on the basis of some serious mental health crises Robin had experienced for a time.[5] Nevertheless, this Court is persuaded that Judge Noel's decision to award Petitioner legal custody was *not* based on Robin's alleged unfitness. Rather, the Court's decision was based on the fact that, at the time, Robin was residing and working in Colorado and Hyrum was doing well in a stable and supportive environment under his father' care. By ruling that upon Robin's relocation to Salt Lake County she and Doug would exercise joint legal and physical custody of Hyrum, Judge Noel implicitly rejected the substance of Doug's claims, concluding instead that both were "fit and proper parents."

¶18 Relying on the terms of the Divorce Decree that provided for automatic change of custody if she moved back to Salt Lake, Robin informed her employer she would not be renewing her teaching contract, and completed her relocation to Salt Lake (and to Hyrum's neighborhood) within six to eight weeks following entry of the Decree

¶19 The parties demonstrated their understanding of Judge Noel's Decree by the fact that they began implementing the shared custody provisions of the Divorce Decree even as they sought to change it.

¶20 When Judge Himonas determined that the *automatic* change of custody provisions of the Divorce Decree violated Utah law, the parties were faced with a new legal interpretation of the Decree that neither side could have foreseen at the time it was entered.

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[5]During the parties' marriage Robin experienced a serious episode of clinical depression that required she be hospitalized for a period of time.

¶21 Additionally, Judge Noel clearly anticipated that Doug's parenting skills would continue to develop, and that he would adopt less harsh discipline methods towards Hyrum. In fact, however, Doug has continued to rely excessively on corporal punishment to the extent that, based on Hyrum's reports, Dr. Gardner (Hyrum's pediatrician) felt compelled to make a child abuse referral to DCFS.

¶22 Although there was insufficient evidence presented to allow the Court to find that child abuse in fact has occurred (and DCFS has apparently not completed an investigation of the referral) the very fact that Hyrum's pediatrician felt it necessary to make the referral suggests that Doug has not adopted the more age-appropriate and less harsh disciplinary methods that Judge Noel expected him to implement.[6]

¶23 At the time the Divorce Decree was entered, Judge Noel also expected that Hyrum would continue to enjoy stability and success in Doug's care. Contrary to Judge Noel's expectations, the evidence presented at trial leads the Court to find that Hyrum has not been thriving in Doug's care. As more fully explained below, credible testimony from Dr. Valerie Hale, the Court-appointed evaluator, leads the Court to find that since Judge Noel entered his findings, Hyrum's level of social, educational, and psychological functioning has deteriorated.

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[6]As referenced earlier, Judge Noel found that Doug had previously slapped and verbally abused Hyrum, but the Court thought that Doug had "learned more appropriate conduct" and "shown a sincere desire to change and to use appropriate [discipline] methods." See Judge Noel's Findings of Fact and Conclusions of Law, at ¶¶ 7,8.

Indeed, at various times since the Decree entered, Hyrum has displayed increased anxiety levels and seriously dysfunctional ideation and behaviors.[7]

¶24 At ¶ 20 of his Findings of Fact and Conclusions of Law, Judge Noel stated as follows:

> The Court finds that if either Doug or Robin do not foster a loving relationship for the child by both parents for the benefit of the child, by either limiting access to the child unreasonably . . . then the Court finds and is of the opinion that the parent does not have the best interest of the child at heart and the Court would take that into account in the future, if any petition to modify the Decree of Divorce comes before the Court. . . .

¶25 Testimony from Dr. Valerie Hale, the Court-appointed evaluator, indicates that Doug has attempted to marginalize Robin's relationship with Hyrum by taking actions such as unplugging the phone, or restricting other contacts between Hyrum and Robin.[8] As explained below, additional evidence of Doug's actions to marginalize Robin can be found in his objections to having Robin participate in Hyrum's IEP, as reported by school personnel. It is also of great concern to the Court that, in summarizing her findings, Dr. Hale commented that "Doug honestly fe[els] that nothing good [can] come to Hyrum from spending time with Robin." The

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[7]*See, e g*, note 8 *infra*. Dr. Hale also reported receiving crisis calls from Hyrum during the course of her evaluation. Although the Court is not altogether clear on the extent to which Hyrum may (or may not) be in crisis presently, the testimony from both Dr. Hale and Dr. Juan Mejia (Doug's expert) amply support a finding that Hyrum continues to need psychological counseling. One of the very few bright spots in the continuing battle between the parents is that both parents now appear to be supporting Hyrum's involvement in counseling with Dr. Merrill Kingston.

[8]In particular, Dr. Hale expressed serious concerns about Doug's ability to manage Hyrum as he entered his teenage years–a time when children's psychological task is to differentiate themselves from their parents. To address these concerns Dr. Hale recommended that Hyrum continue psychotherapy with Dr. Kingston, and that Doug also consider psychotherapy with a qualified therapist to assist him in understanding the effect of his interpersonal behaviors on others.

Court finds that such views and conduct are clearly contrary to Judge Noel's expectation at the time he made his initial custody determination. Therefore, they call into question Judge Noel's initial judgment that Doug would ultimately prove himself to be an effective and cooperative parent. As suggested by Judge Noel at ¶20 of his Findings, parental efforts to exclude the other parent would be an important consideration for the Court in entertaining a future petition to modify the Decree.

Findings Regarding Hyrum's Best Interests.

¶26 At the trial, Dr. Hale testified at length from her custody evaluation report, which was admitted as an exhibit at trial and is part of the case record. Dr. Hale's report carefully examined the required Rule 4-903 considerations, and her findings were based on an extensive data-collection effort that involved interviewing the parties, Hyrum, and numerous collateral sources, as well as examining nearly 300 documents. Based on her evaluation Dr. Hale recommended that Robin be awarded sole legal and physical custody of Hyrum, and that, with one modification, Doug be given "standard" parent-time in accord with the schedule at Utah Code §30-3-35. The modification suggested by Dr. Hale was that Hyrum's mid-week parent-time with Doug extend to include an overnight stay. The Court relies on, and largely adopts the analysis and recommendations of Dr. Hale's report as one of the bases supporting the Court's findings of fact that Hyrum's best interests will be served by modifying the custody arrangement that has existed between the parties.

¶27 Based on the data she collected and analyzed, Dr. Hale concluded that Doug's attitudes and actions continue to be overly rigid, judgmental and moralistic, and these patterns of thought and action are unlikely to change much in the future. According to Dr. Hale, Doug tends to be

unduly critical of anyone–whether it be Hyrum, his teachers, or Robin–whose actions he deems to fall below a certain standard of "appropriate" behavior. Dr. Hale reports that Doug has considerable difficulty in accepting, or even considering, that others may legitimately hold views that differ from his own. Based on other trial testimony and the Court's own observations, the Court agrees with Dr. Hale's assessment.

¶28 In the course of conducting her custody evaluation Dr. Hale spoke with a number of school personnel at Woodrow Wilson elementary school, where Hyrum attends. Specifically, Dr. Hale had contact with (a) Hyrum's 4th and 5th grade teachers, (b) the school's social worker, (c) the district's occupational therapist and speech language coordinator, (d) the school's special education and resource teacher, (f) the school counselor, and (g) the school principal. A number of these individuals also testified at trial. All expressed serious concerns about Hyrum's circumstances and functioning.

¶29 The school personnel confirmed that in March 2006–and against the school's recommendation–Doug discontinued Hyrum's participation in special education and resource classes; he has also twice attempted to move Hyrum to a different school.[9] The school

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[9]At various points in his Findings of Fact and Conclusions of Law Judge Noel clearly determined that Hyrum's best interests required that he be able to enjoy stability and predictability in his school and neighborhood environment. By implication, Judge Noel found that Woodrow Wilson Elementary provided the necessary environment to meet Hyrum's needs.. For example, at ¶7 of his Findings of Fact, Judge Noel conditions having Doug retain the disability payments received on Hyrum's behalf "so long as he remains in his current neighborhood and Hyrum attends his current school while Robin lives in Colorado." Moreover, the change in custody anticipated by the Decree upon Robin's relocation to Salt Lake carried with it the additional proviso that she secure a residence "where Hyrum can reasonably attend his current school from her home . . ." Judge Noel then reiterates "while Doug remains in his current neighborhood and Hyrum attends his current school, the parties should equally share time with Hyrum so that each parent has Hyrum in his [or] her home 26 weeks out of the year." Clearly,

personnel also confirmed that Hyrum continues to need academic support to remain on grade level, and that he is not performing at grade level in science and language. The school personnel also testified that Hyrum is socially isolated, and that Doug has disrupted the educational setting by inappropriately confronting teachers and by threatening litigation For example, the school counselor, Mrs Webster, testified that at the time of Hyrum's February 2005 IEP conference she asked police to be "on standby" because of what she perceived to be Doug's threats. She also testified that in her interactions with Doug she always arranges to have a third-party present to witness the interaction, due to her ongoing concerns in dealing with Doug.[10]

¶30 In contrast, school personnel testified very positively regarding Robin's interactions with the school. They indicated that Robin has volunteered at the school over a period of years, and has a good relationship with the teachers and other school personnel. Robin is viewed as being supportive of, and responsive to, Hyrum's needs, but has been limited in the past because of Doug's actions to exclude her from the IEP process.[11]

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this was a very important consideration for Judge Noel as he determined what was in Hyrum's best interest.

[10]At trial, Hyrum's school counselor (Ms. Webster), testified that Doug had complained of a playground bullying incident in which he felt Hyrum had been victimized. Ms. Webster investigated the incident at length, but Doug was very critical of her investigation and would not accept her findings as valid. Additionally, Ms. Webster testified that Hyrum appeared very stiff and uncomfortable in the presence of his father, but was very relaxed with his mother.

[11]School personnel testified that Doug had insisted it was inappropriate for the school to involve Robin in planning Hyrum's IEP because he was the parent with sole legal and physical custody

¶31 Credible testimony from Hyrum's school teachers and other school personnel establishes that Doug has taken actions that isolate Hyrum and that are not supportive of his needs, such as prohibiting Hyrum from participating in certain school enrichment programs, and removing him from the special education resources for which he qualifies and from which he was previously benefitting.

¶32 Based on the totality of the testimony from Hyrum's school personnel, the Court finds that Robin appears to have a better understanding of Hyrum's academic needs, and is better able than Doug to support Hyrum's needs in this area.

¶33 Despite Robin's documented earlier history of severe depression, Dr. Hale found her to be functioning very well presently. Dr. Hale further indicated that she saw no indication that Robin's past mental health issues would be likely to recur. According to Dr. Hale, Robin is an excellent parent who can empathize with Hyrum and anticipate his needs. She is also a vigorous but appropriate advocate of action to enhance Hyrum's psychological and social development. Robin has demonstrated more consistent commitment to ensuring that Hyrum participates in appropriate therapy. In contrast, the Court is very concerned that at one point Doug withdrew Hyrum from therapy during a time when Hyrum was clearly experiencing great difficulties. Moreover, it appears that Doug's actions were driven by his disagreements with Hyrum's then-therapist, without giving due consideration to Hyrum's needs at the time.[12] While both parents

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[12]A therapist by the name of Laura Clark was seeing Hyrum in June 2005. At the time Hyrum was presenting with a variety of "tics," high anxiety, suicidal ideation, and violent ideation. Ms. Clark provided therapy services for approximately 10 months, but Doug discontinued the therapy with Ms. Clark after she wrote a letter (dated March 17, 2006) with which Doug took issue. See Ex. 15.

appear to be supporting Hyrum's present involvement in psychological counseling, the Court finds that Robin has demonstrated a more consistent track record than Doug in this regard

¶34 Based on the testimony at trial, the Court finds that Robin is the parent better suited, by way of character and temperament, to serve as the custodial parent. The Court relies on the testimony and report from Dr. Hale to find that Robin is more likely to foster an ongoing relationship between Hyrum and the other parent than what Doug would do if the Court were to make him the primary custodial parent. Illustrative of the testimony that supports the Court's finding on this issue (and to which the Court gives considerable weight) is a comment by Hyrum reported by Dr. Hale in the course of her testimony. According to Dr. Hale, Hyrum told her that "mom helps [him] buy gifts for dad, but dad will not help [him] to buy gifts for mom." By contrast, the Court is persuaded that if given the opportunity to do so, Doug will continue his efforts to exclude Robin from Hyrum's life. As Dr. Hale noted in her testimony, "Doug honestly feels that nothing good can come to Hyrum from having him spend time with Robin." Elsewhere in her testimony Dr. Hale stated: "Doug's idea of an ideal situation [for Hyrum] is that after Doug remarries his new wife would take over providing care for Hyrum after school." The Court interprets Dr. Hale's testimony on this issue to mean that, in Doug's view, such an eventuality would largely eliminate the need for Robin's involvement in Hyrum's daily care.

¶35 In reporting the results of her evaluation Dr. Hale indicated that Doug's rigidity in behavior and attitude suggested a diagnosis of Obsessive-Compulsive Personality Disorder (OCPD). In response, Doug presented lengthy testimony from his expert, Dr. Mejia, to challenge Dr. Hale's ostensible "diagnosis." The Court need not reach the question whether Dr. Hale's diagnostic label for Doug is accurate. Indeed, the Court believes it was unfortunate that

Dr. Hale used this diagnostic label because an unproductive amount of time was expended in attempting to refute it. The Court's determination that Robin is the parent best able to meet Hyrum's needs does not depend on the accuracy of Dr. Hale's "diagnosis." What is relevant to the Court are the behaviors and attitudes exhibited by the parties in relation to each other, to Hyrum, and to others who are significant in Hyrum's world. To the extent that testimony from neutral witnesses converges on a point, the Court gives great weight to the facts established thereby, irrespective of labels that may or may not be applicable.

¶36 Dr. Mejia also offered opinion testimony regarding Hyrum's desires and interests. Dr. Mejia testified that his opinion was based on various meetings involving Doug and Hyrum. Although Dr. Mejia testified he had seen Hyrum on approximately six occasions, he did not clarify the length of each of those meetings, exactly who was involved what transpired on those occasions, or what his focus and purpose was in those interactions. Dr. Mejia also acknowledged that he had not met with Robin (either singly or with Hyrum), that he had not conducted a custody evaluation *per se*, and that he had not made any collateral contacts. Thus, Dr. Mejia's own testimony establishes the limited bases for his opinions. After considering the opinion testimony offered by both Dr. Hale and Dr. Mejia, on the basis of the breadth of Dr. Hale's work,[13] and her analysis of those findings in the context of the Rule 4-903 requirements, the Court finds Dr. Hale's testimony and report to be more credible and carry greater validity.

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[13] As documented in her custody evaluation report, in conducting her evaluation Dr. Hale reviewed over 300 documents over a seven-month period, and met numerous times with the parties, with Hyrum, and with other significant collateral contacts.

¶37 The Court has also considered, and given great weight to, the recommendations of the GAL, who endorses Dr. Hale's recommendation that Robin be awarded legal and primary physical custody of Hyrum. The GAL, however, has recommended a substantially more liberal parent-time schedule than the one suggested by Dr. Hale. Specifically, the GAL recommends that Doug be awarded alternate weekends with Hyrum beginning Thursdays after school until Monday morning On the alternate weeks when Doug does not have weekend parent-time, his Wednesday mid-week parent-time extend overnight. The Court agrees with the GAL's recommendation and finds it to be an appropriate parent-time schedule for Doug and Hyrum. In addition, Doug should be awarded standard holiday time schedule. The Court further finds that it is in Hyrum's best interest to enjoy two weeks of uninterrupted parent-time with each of his parents during the summer.

¶38 The GAL also recommended that the Court appoint a parent coordinator to facilitate resolution of issues that may arise between the parents in implementing parent-time arrangements, and that the parties each bear one-half the cost associated with the services of a parent coordinator. In announcing certain preliminary findings at the conclusion of trial the Court agreed with the GAL and found that employing a parent coordinator would assist these parties to work through difficulties that might arise in connection with parent-time issues or other minor custody matters, thus serving Hyrum's best interest.[14]

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[14]Subsequent to trial, however, the Court held a hearing on March 19, 2008 at which the parties, their counsel, and the GAL were present. At that hearing the GAL modified her earlier recommendation that the parties engage the services of a parent coordinator. The GAL informed the Court that since the time of trial, Dr. Kingston (Hyrum's therapist) had successfully assisted the parties in resolving some disputes that had arisen. The GAL recommended that as long as Dr. Kingston is comfortable assisting the parties in this manner, the Court should defer requiring

¶39 The testimony at trial was limited to the issues of (a) material change in circumstances and (b) the best interest of the minor child. Respondent's proposed findings of fact/conclusions of law include certain financial matters not specifically addressed at trial. Specifically, some of Respondent's proposed findings rely on the parties' verified financial declarations to establish their respective monthly incomes. Others address the proper calculation of child support (including Robin's SSDI benefits and/or the dependent disability benefits currently received on Hyrum's behalf), claims for judgments for child support arrears, for allocation of Dr. Hale's fees, and for attorney's fees. Petitioner has objected to those proposed findings on various grounds.[15] The Court agrees with Petitioner that, at trial, no evidence nor argument was presented directly dealing with financial issues. Accordingly, the Court will not address those issues as part of the present Findings of Fact or Conclusions of Law, but will address them through a separate Memorandum Decision after it has considered the parties' supplemental briefing.

Based on the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

¶40 The Findings of Fact at ¶¶1-25 of this decision amply support the Court's conclusion that Robin has adequately established, by a preponderance of the evidence, that a substantial and

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the parties to secure the services of a parent coordinator. The Court agrees and finds that implementation of a parent coordinator should be deferred until such time as the present arrangement fails. At that point, either party or the GAL should be free to bring the matter back to the Court's attention for action.

[15]Petitioner argues that either insufficient (or no) evidence was presented at trial upon which Findings of Fact and Conclusions of Law on those issues could be based, and/or that the Court did not state findings nor take those issues under advisement.

material change in circumstances occurred that was not anticipated at the time Judge Noel entered the Divorce Decree in this case. These changed circumstances are more than sufficient to justify a custody modification in this case.

¶41 The Findings of Fact at ¶¶ 26-38 of this decision amply support the Court's conclusion that Hyrum's best interest will be best served by granting Robin sole legal and physical custody of Hyrum, subject to Doug's exercise of liberal parent time as referenced *supra* at ¶37. In reaching this conclusion the Court has expressly relied upon, and adopted, the recommendations of the custody evaluator and of the GAL. To the extent the GAL's recommendations modify the custody evaluator's recommendations, the Court concludes that the GAL's modifications are appropriate and should be implemented.

¶42 It is in Hyrum's best interest that the parties adopt a mechanism to assist them in resolving the recurring disputes about his care that presently contribute to the contention between them. For that reason the Court initially agreed with the GAL's recommendation that a parent coordinator should be appointed. Because it now appears that Hyrum's present therapist has been successful in assisting the parties to deal with some of these issues informally, the Court has determined that the appointment of a parent coordinator can be deferred. However, if at some point Hyrum's therapist determines that he cannot (or should not) continue to mediate informally whatever minor parent-time or other disputes may arise between the parties, then the Court concludes that Hyrum's best interests will be best served by *promptly* retaining a parent coordinator. If so, either party (or the GAL) can bring the matter to the Court's attention for prompt action. Robin and Doug shall be equally liable for the expenses of a parent coordinator,

and will need to pay one-half of any retainer that may be required within thirty (30) days of a hearing at which either the Court orders, or the Commissioner recommends, such action.

¶43 Although at the time of the trial the Court anticipated that its determination regarding change in custody would be implemented reasonably promptly, delays occasioned by the need to resolve objections to the Court's decision resulted in the parties continuing their shared custody arrangement. At the hearing held March 19, 2008, the Court heard argument from the parties and from the GAL. The GAL argued that Hyrum's best interests were not being served by prolonging the period of shared custody, and urged the Court to enter promptly an Interim Order of Modification so the custodial changes could be implemented prior to the conclusion of Hyrum's Easter/Spring break. The Court was persuaded by the GAL's argument and that same day entered the requested Interim Order. In issuing these Findings of Fact and Conclusions of Law, the Court hereby reaffirms its earlier conclusion that entry of the Interim Order was fair, appropriate, and in Hyrum's best interest.

¶44 Respondent is directed to prepare an Order of Modification consistent with these Findings of Fact and Conclusions of Law.

SO ORDERED BY THE COURT this 7th day of May, 2008.

JUDGE DENISE POSSE LINDBERG
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 034903528 by the method and on the date specified.

METHOD	NAME
Mail	STEVE S CHRISTENSEN Attorney PET 136 E SOUTH TEMPLE STE 1400 SALT LAKE CITY, UT 84111-3156
Mail	SUZANNE MARELIUS Attorney RES 261 E 300 S SUITE 300 SALT LAKE CITY UT 84111-2714
Mail	KIM LUHN Guardian Ad Litem 331 S. RIO GRANDE, #201 SALT LAKE CITY UT 84101

Dated this 7 day of May, 2018.

B. J. Wengert
Deputy Court Clerk

Appendix D

Order of Modification
July 23, 2008

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS PATRICK DOYLE,	:	ORDER OF MODIFICATION
Petitioner,	:	CASE NO. 034903528
vs.	:	
ROBIN ELAINE DOYLE,	:	
Respondent.	:	

The Court held a trial on respondent's Modification Petition on October 2 and 3, 2007. Petitioner was present in person and represented by counsel Steve S. Christensen, Brennan H. Moss, and Matthew B. Anderson. The respondent was present in person and represented by counsel Suzanne Marelius. The minor child was represented by private guardian ad litem, attorney Kim Luhn. The Court heard testimony of witnesses, including custody evaluator, Valerie Hale, Ph.D., considered exhibits, the record and argument of counsel. The Court reserved decision on various financial issues and drafted its own Findings of Fact and Conclusions of Law which were docketed May 7, 2008. The Court has considered supplemental briefing on the issue of proper allocation of the minor child's social security ("SSDI") payments and child support. These

issues were addressed in the Court's Memorandum Decision Re: Child Support and SSDI payments docketed May 20, 2008. As described in the Findings of Fact and Conclusions of Law previously entered in this case, prior to the trial petitioner moved the Court to bifurcate the trial into two separate hearings--the first to address whether the Petition to Modify met the standard of substantial material change in circumstances, and the second to consider Hyrum's best interests. The Court granted petitioner's Motion in part and denied it in part. The Court concluded that judicial economy was best served by having all of the evidence presented during the two days set for trial, although the two issues would be considered separately with the first part addressing whether a showing of substantial material changes in circumstances had been met. The second part of the trial would focus on best interests of the child and custody issues associated therewith. At trial the Court considered these issues separately and in the order prescribed by law.

Based on the Findings of Fact, Conclusions of Law, and written rulings previously entered in this matter, the Court directed respondent's counsel to prepare an Order of Modification (the "Order"). Petitioner lodged various Objections to the proposed Order. The guardian ad litem has also weighed in regarding the proposed Order. The Court has considered the respondent's proposed Order and the Objections and

comments thereto, and now enters its own Order of Modification as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1 The respondent has established sufficient change of circumstances to modify the Decree of Divorce entered by Judge Frank Noel on February 28, 2005. Specifically, the Court has found substantial, material changes of circumstances have occurred in the custody and parent-time arrangements of these parties since entry of the Decree, which changes were not anticipated at the time the Decree was entered. Primary among these is the unanticipated change in the custody order from what was contemplated by Judge Noel's Decree after Judge Himonas' subsequent review of that Decree. Additionally, there was significant evidence presented at trial that the child had not continued to enjoy stability and success of parenting in petitioner's care as anticipated in the Decree. To the contrary, since the time the Decree was entered the child's level of social, educational, and psychological functioning has deteriorated.

2 Custody and Parent-Time. The Court considered the extensive evidence regarding the custody and parent-time needs of the minor child Hyrum Doyle (dob 7/9/96), and for the reasons given in its Findings of Fact and Conclusions of Law, the Court concludes that respondent is the

more appropriate parent to exercise primary custody of the child. The Court awards to respondent Robin E. Doyle the sole care, custody and control of this minor child subject to reasonable parent-time for petitioner. In reaching this conclusion the Court has expressly relied upon and adopted the recommendations of the custody evaluator and of the guardian ad litem.

3 The Court adopts the guardian ad litem's recommendations of parent-time and hereby awards to petitioner Douglas Doyle alternate weekends with Hyrum, beginning Thursdays after school and extending until Monday morning. On the alternate weeks when petitioner does not have weekend parent-time, his mid-week parent-time shall extend overnight and he shall return the child to school, or to his mother's care the following morning if school is not in session.

4 Each parent is awarded two weeks of uninterrupted parent-time with the minor child to be scheduled during the summer school break. Each party must give the other thirty (30) days advance written notice of the time selected. At the time of entry of this Order, the standard schedule of holiday parent-time ordered herein is as follows:

(a) At the election of the non-custodial parent, parent-time over a scheduled holiday weekend may begin from the time the child's school is regularly dismissed at the beginning of the holiday weekend until 7 p.m. on the last day of the holiday weekend.

(b) At the election of the non-custodial parent, if school is not in session, parent-time over a scheduled holiday weekend may begin at approximately 9 a.m., accommodating the custodial parent's work schedule, the first day of the holiday weekend until 7 p.m. on the last day of the holiday weekend, if the non-custodial parent is available to be with the child, unless the Court directs the application of Subsection 2(e)(ii)(A).

(i) A step-parent, grandparent, or other responsible individual designated by the non-custodial parent, may pick up the child if the custodial parent is aware of the identity of the individual, and the parent will be with the child by 7 p.m.

(ii) Elections should be made by the non-custodial parent at the time of the divorce Decree or Court Order, and may be changed by mutual agreement, Court Order, or by the non-custodial parent in the event of a change in the child's schedule.

(c) In years ending in an odd number, the non-custodial parent is entitled to the following holidays:

(i) Child's birthday on the day before or after the actual birth date beginning at 3 p.m. until 9 p.m.; at the discretion of the non-custodial parent, he may take other siblings along for the holiday.

(ii) Martin Luther King, Jr., beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the non-custodial parent is completely entitled;

(iii) Spring break beginning at 6 p.m. on the day school lets out for the holiday until 7 p.m. on the Sunday before school resumes;

(iv) July 4 beginning 6 p.m. the day before the holiday until 11 p.m. or no later than 6 p.m. on the day following the holiday, at the option of the parent exercising the holiday;

(v) Labor Day beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the non-custodial parent is completely entitled;

(vi) The fall school break, if applicable, commonly known as U.E.A. weekend beginning at 6 p.m. on Wednesday until Sunday at 7 p.m., unless the holiday extends for a lengthier period of time to which the non-custodial parent is completely entitled;

(vii) Veteran's Day holiday beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday; and

(viii) The first portion of the Christmas school vacation as defined in Subsection 30-3-32(3)(b) including Christmas Eve and Christmas Day until 1 p.m. on the day halfway through the holiday, if there are an odd number of days for the holiday period, or until 7 p.m. if there are an even number of days for the holiday period, so long as the entire holiday is equally divided.

(d) In years ending in an even number, the non-custodial parent is entitled to the following holidays:

(i) Child's birthday on actual birth date beginning at 3 p.m. until 9 p.m.; at the discretion of the non-custodial parent, he may take other siblings along for the birthday;

(ii) President's Day beginning at 6 p.m. on Friday until 7 p.m. on Monday, unless the holiday extends for a lengthier period of time to which the non-custodial parent is completely entitled;

(iii) Memorial Day beginning at 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the non-custodial parent is completely entitled;

(iv) July 24 beginning at 6 p.m. on the day before the holiday until 11 p.m. or no later than 6 p.m. on the day following the holiday, at the option of the parent exercising the holiday;

(v) Columbus Day beginning at 6 p.m. the day before the holiday until 7 p.m. on the holiday;

(vi) Halloween on October 31 or the day Halloween is traditionally celebrated in the local community from after school until 9 p.m. if on a school day, or from 4 p.m. until 9 p.m.;

(vii) Thanksgiving holiday beginning Wednesday at 7 p.m. until Sunday at 7 p.m.; and

(viii) The second portion of the Christmas school vacation as defined in Subsection 30-3-32(3)(b), beginning 1 p.m. on the day halfway through the holiday, if there are an odd number of days for the holiday period, or at 7 p.m. if there are an even number of days for the holiday period, so long as the entire Christmas holiday is equally divided.

(e) The custodial parent is entitled to the odd year holidays in even years and the even year holidays in odd years.

(f) Father's Day shall be spent with the natural or adoptive father every year beginning at 9 a.m. until 7 p.m. on the holiday.

(g) Mother's Day shall be spent with the natural or adoptive mother every year beginning at 9 a.m. until 7 p.m. on the holiday.

5 The Court concludes that Hyrum's best interests will be furthered if these parties avail themselves of the services of a parent coordinator to facilitate resolution of issues that may arise between them in implementing parent-time. However, the Court has chosen to defer appointment of a parent coordinator at this time. On March 19, 2008 the Court held a post-trial hearing at which the parties, counsel, and the guardian ad litem were present. The guardian ad litem informed the Court that since the time of trial, Dr. Merrill Kingston (Hyrum's therapist) has successfully assisted the parties in resolving some disputes that have arisen. The Court finds that so long as this therapist is comfortable assisting the parties in this manner, the Court will not require the parties to secure immediately the services of a parent coordinator. Therefore, appointment of a parent coordinator is deferred until such time as the present arrangement fails. At some future time Dr. Kingston may no longer be willing to continue his involvement in this function. At such time as that occurs, if at all, either party or the guardian ad litem may bring the matter back to the Court's attention for action. The parties will be required promptly to confer and select an acceptable parent coordinator. If the parties cannot reach agreement within one week of being notified that Dr. Kingston is no longer wiling to continue this service, the parties will then have one additional week

within which each will submit to the Commissioner the name and resume of an appropriate parent coordinator. The Commissioner will review the submissions and recommend a parent coordinator. The Court will appoint the parent coordinator. Within thirty (30) days of appointment, each party shall be required to pay one-half of any retainer the parent coordinator may require. Each party will also be responsible for paying one-half of the cost for the services of the parent coordinator.

6 Although at the time of the trial the Court anticipated that its determination regarding change in custody would be implemented reasonably promptly, delays occasioned by the need to resolve objections to the Court's decision resulted in the parties continuing their shared custody arrangement. At the hearing held March 19, 2008, the Court heard argument from the parties and from the guardian ad litem. The guardian ad litem argued that Hyrum's best interests were not being served by prolonging the period of shared custody, and urged the Court to enter promptly an interim Order of Modification so the custodial changes could be implemented prior to the conclusion of Hyrum's Easter/Spring break. The Court was persuaded by the guardian ad litem's argument and that same day entered the requested interim Order. In issuing this Order, the Court hereby reaffirms its earlier conclusion that entry of the interim Order was fair, appropriate, and in Hyrum's best interests.

7 Child Support and SSDI Payments. At the divorce trial held before Judge Frank Noel, the Court made a determination on the issue of child support and allocation of the minor child's social security (SSDI) payments. Respondent Robin Doyle is totally blind and receives SSDI as a result of her disability and there is also a dependent payment paid separately on behalf of her minor child. In the divorce Decree Judge Noel gave petitioner Douglas Doyle sole legal and physical custody. But, if respondent Robin Doyle relocated to the Salt Lake valley, the Decree provided that the parties would have joint legal and joint physical custody and share time equally. The Decree also provided that the social security payments that Hyrum receives based on Robin's disability would satisfy *both* parties' child support obligations and should be equally divided. Neither party would have a child support claim against the other. After the Decree was entered, both parties filed post-trial Motions. The Motions were heard by Judge Deno Himonas on January 11, 2006. Judge Himonas granted petitioner's post-trial Motion, finding that the portion of the divorce Decree that provided for an *automatic* change of custody based on Robin's relocation to the Salt Lake valley was improper. Judge Himonas concluded that a change of custody could only be made as part of a modification Petition. Judge Himonas' ruling did not address the issue of child support or SSDI credits.

8 Based on that ruling, respondent promptly filed a Petition to Modify. The Court awarded temporary sole custody to petitioner and continued the fifty-fifty parent-time sharing arrangement that the parties had instituted upon respondent's return to the Salt Lake valley.

9 By entry of an interim Order March 19, 2008, the Court changed custody to respondent Robin Doyle, and awarded her sole legal and physical custody of the minor child. The Court requested briefing on the issue of child support and allocation of the SSDI payment. After considering the briefs of the parties and applicable law, the Court is persuaded that the Decree of Divorce contained errors in how it allocated Hyrum's SSDI payments, and in determining that it satisfied the parties' respective obligations for child support. The Decree failed to establish the parties' gross incomes as required by law, and did not establish a support obligation for each party in accordance with statutory guidelines. The Court also incorrectly credited petitioner with one-half share of Hyrum's SSDI payments and finally, incorrectly deemed those benefits to satisfy the support obligation of both parties. Utah law clearly provides that when minor children are involved in a divorce case, the Court must establish each parent's income and child support obligation towards their minor children. Based on review of the Financial Declaration, the petitioner's gross monthly income is $1,889.60

per month, and respondent's gross monthly income from salary and wages is $525 per month. Respondent also receives another $1,176 in direct SSDI payments to her based on her disability. Each party reported receiving $317.50 as their one-half share of Hyrum's SSDI payment. The Court will use only respondent's earnings in the amount of $525 per month as wages for child support calculation purposes. Specifically excluded from her gross income is her separate SSDI payment as required by Utah Code Ann., § 78B-12-203(3) (formerly Section 78-45-7.5(3)).

10 The parties agree that the Court should use the Joint Physical Custody Worksheet based on the parent-time orders of the Court. The Court finds that petitioner's time with Hyrum over the period of one calendar year is 138 overnights, respondent has 227 overnights, and these are the figures to be used in a Joint Physical Custody Worksheet. Applying the child support guidelines to the joint physical custody worksheet formula, incomes, and other findings of the Court, petitioner's child support obligation is determined to be $283.94 per month. Respondent's child support obligation is $94.82 per month. Respondent's portion of the child support obligation must also be credited against the SSDI amounts received on Hyrum's behalf. Furthermore, pursuant to Coulon v. Coulon, 915 P.2d 1069 (1996 UT App), the SSDI amounts received for Hyrum in excess of respondent's child support obligation are to be

used for Hyrum's benefit and petitioner may not claim credit from those "excess funds." Rather, they are to be received by respondent and used by her for Hyrum's benefit as she may determine at her sole discretion.

11 The petitioner's child support obligation is thus ordered at the level of $283.94 per month. This obligation shall be effective as of the date respondent assumed primary physical custody pursuant to the Court's interim Order of Modification entered March 19, 2008. This support shall be due and payable one-half by the 5th and one-half by the 20th of every month, and respondent may avail herself of the services of the Office of Recovery Services to ensure receipt of these payments in a timely manner.

12 The Court reaffirms its ruling in the interim Order that respondent is to be the payee for Hyrum's SSDI benefits.

13 Health Insurance. The parties are ordered to share equally in the cost of any health insurance premiums incurred for Hyrum's health and dental care. Each party shall be responsible for paying one-half of any out-of-pocket medical or dental expenses that are not covered by such insurance. Reimbursement for out-of-pocket expenses for the minor child's health and dental care shall be made pursuant to Utah Code Ann., § 78B-12-212 (formerly Utah Code Ann., § 78-45-7.15). This section includes a requirement that a parent who incurs medical or dental expense

shall provide written verification of the cost and payment of the expense to the other parent within thirty (30) days of payment, and that parent shall be reimbursed one-half that verified amount within thirty (30) days of receipt of payment.

14 Attorney's Fees. The parties have filed Affidavits and briefing concerning attorney's fees which will be addressed by the Court in a separate ruling.

Dated this 23 day of July, 2008.

DENISE P. LINDBERG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order of Modification, to the following, this 23 day of July, 2008:

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